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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1985

BEGINNING OF TERM

OCTOBER 7, 1985, THROUGH FEBRUARY 21, 1986

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

HENRY C. LIND

REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1988

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

RETIRED

POTTER STEWART, ASSOCIATE JUSTICE.[1]

OFFICERS OF THE COURT

EDWIN MEESE III, ATTORNEY GENERAL.
CHARLES FRIED, SOLICITOR GENERAL.[2]
JOSEPH F. SPANIOL, JR., CLERK.
HENRY C. LIND, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
STEPHEN G. MARGETON, LIBRARIAN.

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[1] Justice Stewart, who retired effective July 3, 1981 (453 U. S. VII), died on December 7, 1985. See *post*, p. XXV.

[2] The Honorable Charles Fried, of Massachusetts, was nominated by President Reagan on September 26, 1985, to be Solicitor General; the nomination was confirmed by the Senate on October 22, 1985; he was commissioned on the same date and took the oath of office on October 23, 1985. He was presented to the Court on November 4, 1985 (see *post*, p. XXIII).

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *it is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

PROCEEDINGS IN COMMEMORATION OF THE 50TH ANNIVERSARY OF THE OPENING OF THE SUPREME COURT BUILDING

MONDAY, OCTOBER 7, 1985

Present: CHIEF JUSTICE BURGER, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, JUSTICE REHNQUIST, JUSTICE STEVENS, and JUSTICE O'CONNOR.

THE CHIEF JUSTICE said:

We are in special session today to take note of the fiftieth anniversary of the opening of this building; and, as is not entirely uncommon, the Court is ahead of some of the lawyers who will be attending the proceedings.

We have the privilege of having three distinguished American lawyers here to take note of these events. We begin with Mr. Erwin Griswold, former Solicitor General of the United States and former Dean of Harvard Law School. Mr. Griswold.

Mr. Griswold: MR. CHIEF JUSTICE and may it please the Court:

This Court and its bar live in what I believe is called a symbiotic relationship. Each benefits from the presence of the other. At any rate, the bar hopes that is an accurate statement.

The bar has its role, but it is not very cohesive. There is no published list of the membership of this Court's bar and no organization of it. Indeed, no one knows how many members there are. The Clerk's office tells me that no applications were required until 1925.

Since then there have been applications, and these have been numbered serially. At the present time the number of such applications is somewhat over 165,000. But there is no record of those who have died or retired from active practice. As a guess, I would say that there are about 75,000 lawyers in this country who are members of this Court's bar.

It is a privilege to speak on their behalf and to express the appreciation of the bar for the important role which this Court plays in our constitutional and legal structure.

We do know one thing: The first member of the bar of this Court was Elias Boudinot of New Jersey, who was admitted in February 1790. Of course, there was no one to move his admission, but this Court was flexible. It had not yet established procedures for the filing of credentials.

For the first few admissions, the Court apparently relied on judicial notice. The judges knew who were the qualified lawyers and they were admitted. After about a year, the Court turned to the Attorney General, Edmund Randolph. Though he was never admitted to practice before the Court, he was treated as an officer of the Court.

And before long, the practice was established of admission to the bar on motion of persons already admitted. Under the first admissions rule, adopted on February 5, 1790, the Court made the provision, which continues to this day, that applicants for admission shall have been admitted for "three years past in the Supreme Court of the state to which they respectively belong."

The formula also provided then, as it did throughout the nineteenth century, that the private and professional character of the applicants "shall appear to be fair." As our language evolved, the word "fair" acquired a double meaning, and the use of the phrase sometimes produced a laugh in the courtroom. So the wording was changed, and for many years in the twentieth century the sponsor was required to say that he vouched for the applicant. Under the rule as it now stands, he affirms that the applicant is of good moral and professional character.

All motions for admission were made in open court until about 15 years ago. Now, in accordance with modern times, the whole procedure can be done by mail.

Under the first rule for admission, the applicant was required to elect whether he would practice as an attorney or as a counselor, and he could not practice as both. If this rule had continued, the British distinction between solicitors and barristers would have been established here, and we might have a narrower group today which could be recognized as the bar of the Supreme Court.

Indeed, the Circuit Court for the First Circuit provided for four degrees: attorneys, counselors, barristers, and sergeants. Charles Warren in his "History of the American Bar" refers to an order by Justice Story made in that court in 1812 admitting on his own motion Jeremiah Smith and Jeremiah Mason to the degree of sergeant at law, and as far as I know they are the only lawyers who have been sergeants at law in this country.

Many great lawyers have appeared before the Court. John Marshall appeared in one case in the late 1790's, unsuccessfully. Others who may be mentioned are Luther Martin, Caesar Rodney, and Roger B. Taney. These were the days of oratory, and by the 1830's Daniel Webster achieved his long continued eminence before the Court.

His appearances were often great social events, with large crowds both of men and women attending the Court sessions, for often several days were devoted to a single case. In those days Webster argued several hundred cases, more than have been presented before the Court by any other person in its history.

Interestingly enough, the member of the bar with the second largest total of arguments has left little trace. He was Walter Jones, admitted to practice in 1796, and the United States Attorney in the District of Columbia from 1802 to 1821.

In later years, he often acted in association with Daniel Webster. Among others, he argued the case of Martin

against Hunter's Lessee and McCulloch against Maryland. He also appeared in the first hearing of the Charles River Bridge case, where he was opposed by Daniel Webster.

We ought to have more information about Walter Jones, and perhaps the Supreme Court Historical Society can find a way to make him better known.

The history of the Court and its bar is of course intertwined with the history of the country. The details are being developed in the great history of the Court which is being prepared under the Oliver Wendell Holmes bequest. I will refer to only two events, both reflecting the Court's interrelationship with the slow but steady progress which the country made during the nineteenth century with two fundamental problems.

The first black lawyer to be admitted to the bar of the Supreme Court was Dr. John S. Rock, who was born of free parents in New Jersey in 1825. He was admitted on February 1st, 1865, just short of his fortieth birthday. Before then he had been a teacher, a dentist, and a doctor. He had moved to Boston in 1853 and he was one of the founders of the Republican Party in Massachusetts.

In 1858 he wanted to go to France for medical treatment, but he was refused a passport on the ground that he was not a citizen. The Massachusetts legislature then passed a law providing for state passports—I'm not sure this Court would accept that today—and this was accepted in France.

A year or so later, Dr. Rock returned to Boston and began to read law. He was admitted to practice in Massachusetts in September 1861 and he was admitted to practice in this Court on February 1, 1865. Note that date—shortly after the appointment of Salmon P. Chase as Chief Justice.

This came before the final termination of the Civil War and before the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments and with the Dred Scott case still on the books. As the New York Tribune reported: "By Jupiter, the sight was good." It must have been one of the dramatic moments in this Court's history, at least in retrospect.

Rock's admission was moved by Senator Charles Sumner. The newspaper reporter observed that "The assenting nod of

the Chief Justice dug the grave to bury the Dred Scott decision."

I am glad to record, too, that one of the persons who encouraged Dr. Rock was George L. Ruffin, whom we believe to be the first black graduate of the Harvard Law School.

The next event to which I will refer was the admission of the first woman to the Supreme Court bar. In 1872, this Court had refused to interfere with the action of the Supreme Court of Illinois, which denied admission to Myra Bradwell, who was the wife of a judge in Chicago. She relied in this Court on the equal protection clause of the recently adopted Fourteenth Amendment, but was unsuccessful. It may be mentioned that Chief Justice Chase was the sole dissenter from this conclusion.

It was less than seven years later, though, that Belva A. Lockwood became the first woman admitted to practice before the Court. This was on March 3rd, 1879. So quick was the change of view that this evoked no opinion from any member of the Court. Indeed, Mrs. Bradwell, who was denied admission in 1872, was finally admitted when she applied again in March 1892 on motion of Attorney General W. H. H. Miller.

Alice O'Donnell has pointed out in her paper in the 1977 Yearbook of the Supreme Court Historical Society that it took 41 years or until 1929 before the first 100 women became members of the bar of the Court. Some of the early admittees had great careers in the law. I will mention only Florence Allen, who became the first woman judge of a constitutional federal court; Mabel Walker Willebrand, who was Assistant Attorney General under President Hoover; and Helen Carloss, who had a long and distinguished career in the Tax Division of the Department of Justice and was an extraordinarily persuasive lawyer in the federal courts, including this Court.

A great increase in the number of women lawyers has occurred in the past 15 years. In another 15 years, if present trends continue, perhaps 30 percent of the members of the bar of this Court will be women. This will surely have an

important impact, though it is not as yet clear just what that impact will be.

Is there a bar of this Court? It is hard to say. There have been periods when there was a relatively small group of lawyers who were widely recognized as leaders of the bar of this Court. They were the orators of the nineteenth century, starting with Daniel Webster and continuing through John G. Johnson of Pennsylvania.

There was a bar in the 1920's and 1930's, when such lawyers as Charles Evans Hughes, Owen D. Roberts, John W. Davis, George Wharton Pepper, and William D. Mitchell made frequent appearances before the Court. By this time, oratory was passé. The presentations were less flowery, but they were mellifluous.

As a young lawyer, I was fascinated by John W. Davis and his skill at crossing thin ice with great artistry, reaching the other side safely before it was fully recognized that the ice was so thin.

There is one case which I recall which brought together three of these giants. This was United States against George Otis Smith in 1932. It involved the question whether the Senate could reconsider the confirmation of a presidential nomination after the President had acted on it.

The Senate retained John W. Davis as its counsel. Attorney General William D. Mitchell appeared for the United States, essentially representing the President. And George Wharton Pepper represented Mr. Smith. That was surely one of the high points of advocacy in this century.

With the great increase in ease and speed of travel since World War Two, there is much less concentration on work before the Court, although it has never been highly concentrated since the days of Daniel Webster and Walter Jones. This is inevitable in a country as large and diverse as this country is.

It might have been different if the original division between attorneys and counselors had prevailed. It is hard to

think, though, that such an arrangement, while having some advantages, would have been a good one overall. In any event, it is really impossible to have such distinctions in this country.

There is one group which has long provided the backbone of the Supreme Court bar. That is the Solicitor General and his staff and his associates in the Department of Justice. This office has long maintained a high standard and a great tradition. It appears in one way or another in nearly half of the cases which are heard on the merits by the Court and in a high percentage of all applications for review.

I should also refer to the considerable number of cases which have been presented here by what we now know as special interest groups. I think, for example, of the work done in the early days of the NAACP, which was represented here by one of the country's great lawyers, Charles Hamilton Houston, work which was carried on later with great ability by Thurgood Marshall. And I may mention the work done by lawyers representing groups interested in the rights of women, of whom Ruth Bader Ginsburg was an outstanding example.

The bar of this Court has a somewhat difficult role. As I have indicated, it is scattered and diverse. It can never be assembled, nor is it possible to take a consensus of the bar. Nevertheless it is clear, at least to me, that the Court could not get along without it.

Yet, the demands on the Court are such that the bar finds difficulty in making its full contribution. Fifty years ago when the Court first met in this building, it heard arguments five days a week for a total of about 75 days a year. Now it hears arguments for about 45 days during the year.

Fifty years ago, the time made available for oral arguments was an hour on each side and there were frequent substantial allowances of additional time. Now the time allotted is 30 minutes on a side and additional time is, shall I say, a very scarce commodity.

This inevitably presents problems for the oral advocate and requires a wholly different type of argument from that which was customary even 50 years ago. The lawyer today can rarely deal with his case as a case. He has to pick out certain salient points and hope that, with the welcome questioning, he will have time to deal with the matters he regards as vital.

I think that the briefs today are on average much better than they were 50 years ago, probably more improved than is commonly recognized. But oral argument often remains a difficult and somewhat tantalizing field.

This Court moved into this great building 50 years ago today. According to the newspaper articles, the first words spoken by Chief Justice Hughes in this courtroom were: "Are there any admissions?" Thus was the bar recognized, and thus has it been recognized at every session since.

The Court heard no arguments on the opening day. There were, however, many admissions, including Harold B. Willey, Chief Deputy Clerk of the Court, and Mary Agnes Quinn, the Docket Clerk in the Solicitor General's Office.

The first business before the Court was a motion made, appropriately enough, by Solicitor General Stanley F. Reed. The first case was argued before the Court a week later on October 14th. That was the case of Douglas against Wilcutts. It was a tax case, and it was, too, the first case whose decision was announced in this room. It is reported in 296 U. S., page 1.

Just as we are hearing these days in cases before the Court about non-bank banks, verbally a rather odd concept, I think I may well close these remarks by referring to the non-bar bar. For the brief for Douglas in that case was written by a young lawyer who had graduated from the Harvard Law School in 1932 and had not yet completed the three years required for admission here. Thus his name, though on the brief, does not appear in the United States Reports, since he was a member of the non-bar bar.

He was, though, well worthy of the assignment. His name later became well known here. He was Harry A. Blackmun.

CHIEF JUSTICE BURGER: Thank you, Mr. Griswold. Mr. Attorney General.

Attorney General Meese: MR. CHIEF JUSTICE and may it please the Court:

It is a privilege for me to be here today representing the Department of Justice and the Executive Branch of the Government in these proceedings.

Fifty years ago on the date that we are commemorating here, this nation was in the midst of a great Depression. To borrow Tom Paine's language of an earlier critical period in our history, it was a crisis that truly did try men's souls.

The problems of that era were deeper than economic despair and Depression. The deepest problem, the greatest threat of that time, was that our very system of government had been called into question. It was a time where our fundamental precepts of democracy were being challenged from without as well as from within.

Our great national economic tragedy came at a time when new and foreign ideologies were attacking the very soul and spirit of free and democratic institutions around the world. The communist and fascist movements abroad were gaining strength and sought to promote themselves as the dominant force in the world, at the expense of liberty and peace.

In the midst of an increasingly confused and confusing world, the structure we honor today arose here in our nation's capital. As though to serve as a moral beacon to all the world, the new building of the Supreme Court stood

forth, dedicated to that most basic principle of civilization, the rule of law.

Equal justice under law, that is what we as a people stood for then, as we had since the founding of our Republic; and that is what we as a people stand for today.

Now as then, this Court in many ways represents our national vision of a just and civilized world. As an impartial and independent institution under our Constitution, the Supreme Court, symbolic of our entire Judiciary, gives practical effect to the idea of the rule of law.

In The Federalist Papers, as in other writings during our founding period, this Court was deemed to be an essential part of that new science of government which had led to the framing of the Constitution. Alexander Hamilton confessed that under the previous Articles of Confederation the lack of a judiciary was a crowning defect. After all, he said, "laws are a dead letter without courts to expound and define their true meaning and operation."

Indeed, Hamilton went on to say that "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution." He concluded that "[a] constitution is, in fact, and must be regarded by the judges, as a fundamental law." Without this understanding and without an independent judiciary to guard the lines and the limits of the original Constitution, all the "particular rights or privileges" of that Constitution "would amount to nothing."

The magnificent structure in which we are now gathered symbolizes both the necessary independence and the constitutional integrity of the Supreme Court. It stands apart from, yet is near to, the homes of the other two branches.

It is a serious and a solemn place. In terms of those who wrote in The Federalist Papers, there is no wielding of the sword nor control of the purse strings here. There is, as the founders prescribed, only judgment.

I congratulate this Court as it celebrates its first 50 years in this magnificent marble building, a temple of reason, a temple of justice, and a temple of law.

Thank you.

CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

The Court recognizes Mr. William Falsgraf, the President of the American Bar Association, to speak for the legal profession as a whole. Mr. Falsgraf.

Mr. Falsgraf: MR. CHIEF JUSTICE and may it please the Court:

I am truly delighted to bring the congratulations and best wishes of the American Bar Association and in fact all of the lawyers of America as the Supreme Court celebrates 50 years in this magnificent hall. As spokesman for the American legal profession, I want to express on behalf of my colleagues across the country our profound respect for the Court, both before and after it obtained this permanent home.

We know that for some 144 years the Court performed its constitutional duties with dedication and often with brilliance despite the lack of an adequate and dignified quarters. Nevertheless, there is indeed symbolic importance in its having an impressive and dignified home.

Our Association has recognized and acknowledged that fact since the first foundation stone of this building was laid some 53 years ago. For we recognize that appropriate physical surroundings are essential in order for the Court to serve as our nation's primary symbol of the rule of law.

Generations of Americans and guests from around the world have visited this building and been overwhelmed by its grace and by its dignity. This is indeed a hallowed place, an appropriate acknowledgment by the people of the United

States of the critical role which the third coequal branch of government plays in our constitutional form of government.

The special feeling that we in the ABA have for this building was first given expression by leaders of the Association who were intimately involved in the construction and dedication of this edifice. The energy and the leadership with respect to the construction of this building of course came from Chief Justice William Howard Taft, who was a former President of the American Bar Association as well as a former President of the United States of America. And incidentally, Chief Justice Taft was a fellow Ohioan, of which I am personally quite proud.

Unfortunately, Chief Justice Taft died in 1930, before his dream of a permanent home for this Court could take shape. But his widow was present at the cornerstone laying of this building in 1932. This was indeed an appropriate recognition of the leading role which Chief Justice Taft played in the planning for and the ultimate approval for the design and construction of this temple of the law.

All three speakers at the laying of the cornerstone had served or were serving as President of the American Bar Association. Guy Thompson of St. Louis, who represented the legal profession, was of course then Acting President of the American Bar Association. The Honorable John W. Davis, who spoke for the bar of the Supreme Court, had served as President of the American Bar Association in 1922–23. And Chief Justice Hughes himself, speaking for the Court, had been ABA President in 1924–25.

The text of these speeches were among the articles that were placed within the cornerstone of this building. In his remarks, President Thompson predicted that this building would be "a monument to justice," and how prophetic those comments have become.

John W. Davis called this place "the abode of the peacemaker" and "the house of refuge for all such as are oppressed."

In response, Chief Justice Hughes said: "This building is the symbol of the distinctive character of the Republic, the symbol of its faith. It suggests permanence, not the permanence of stone and steel but of an idea, a testimonial to an imperishable idea of liberty under law."

Well, tremendous changes have swept over this land in the past 50 years, and yet the dedicatory sentiments of my predecessors, like the beauty and the grace of this building, are as relevant and apt today as they were 50 years ago.

As we look to the Court's next 50 years and beyond, it is entirely appropriate for us to pause and to do as we are today, acknowledging that which is past. When this Court was established, constitutional government was indeed a revolutionary idea, and perhaps still is in other parts of the world. The form of nearly every other government which was then in existence almost 200 years ago has changed so drastically as to be virtually unrecognizable to their subjects of two centuries ago.

Many of the fundamental tenets of scientific knowledge which were the presumption of that age have been found to be flawed when examined under the light of newly discovered truths involving matter, energy, space, and time. The industrial revolution has come and gone, the atomic age has arrived. And yet, our nation and the Constitution under which it operates have not only endured, they have thrived.

How fitting it is, then, that we celebrate today the tangible symbol of that durability which is this building. The American people owe a debt beyond counting to the Supreme Court of the United States as the definitive interpreter of the Constitution, our highest law.

This Court is not only the refuge for all such as are oppressed, it is the bulwark of freedom for every citizen, regardless of his or her station in life. For just as the cornerstone serves as the support for the walls and the roof of this building, so the Constitution serves as the support for our Republic and the fundamental freedoms that have allowed our citizens to make it great.

Let us give thanks, then, first to the architects of this building and all of those who labored to make that design a reality. But let us give greater thanks to the architects of our Constitution and those who labor within these laws to make the blessings of freedom secured by that Constitution a continuing reality.

CHIEF JUSTICE BURGER: Thank you, Mr. Falsgraf.

As Mr. Griswold has noted in his excellent statement, when the Court gathered here precisely 50 years ago today at 12:00 noon it did not undertake to hear oral arguments, but formally opened the Term and then retired to the Conference Room and undertook to deal with the accumulation of petitions for certiorari, jurisdictional statements, and motions that had accumulated during the summer.

In recent years, the pressure of the docket has led the Court to hold the conferences on the summer accumulation in the last week of September so that we could begin, as we did this morning, at 10:00 o'clock to hear oral arguments.

The tortoise, which Cass Gilbert employed in much of his design in this Building, is of course, a more ancient symbol of justice than the blindfolded lady for both justice and the law are like the tortoise, rather than the swift hare of the fable.

Yet some changes have occurred, as some of the speakers have commented. In 1935, as Mr. Griswold said, the Court allowed one hour for each side and sometimes more, and was able to hear two cases each day or ten cases a week with a conference on Saturday. This was changed about 15 years ago when we limited the oral argument to 30 minutes on each side. Now we hear 12 cases a week, leaving Thursday free for the Justices to prepare for the Friday Conference. On Saturday and on Sunday, the Justices are still engaged in the work of the Court. The time allowed for oral argument is now very different from an earlier day.

In the Dartmouth College case, for example, after some days of oral argument, we can well imagine that Chief Justice

Marshall may have said to Daniel Webster: "Mr. Webster, you have now had three and a half days; do you think you will finish this week?" Contrast that, if you will, with the legend—and it has not been verified—that when the red light came on in Chief Justice Hughes' time, he would stop a lawyer in the middle of the word "if."

Of course, we are much more liberal now. We allow a lawyer to finish the sentence that is unfolding when the red light goes on, provided, of course, the sentence is not too long.

Sometimes, as close observers of the Court observed, we Justices do not always fully agree about everything, and that was true when the Chief Justice began his efforts to have this Building erected. Some of the Justices felt it was not a good idea for the Court to lose regular contact with the leaders of Congress whose support was needed for whatever it was that the Court needed.

There may have been some merit to that view, but Chief Justice Taft was concerned more, as the speakers have indicated, with matters other than the comfort and the needs of the Justices. He was profoundly concerned with the need for a visible symbol of the independence of the third branch of government as a separate and a coequal branch.

The differing views of the Justices at that time was illustrated in a story, perhaps a legend, of 1935 that one Justice is reported to have said that he expected each member of the Court would be provided with an elephant to ride into the Building mounted on that elephant much like a rajah. Just how those elephants were going to negotiate those steep stairs out in front of the Building has never been made clear.

Habits of judges and Justices, as with lawyers, change slowly. Having worked in their homes with their clerks and secretaries at hand, there was no great rush on the part of the Justices to occupy this splendid building, with luxurious three-room suites provided for each Justice.

Chief Justice Hughes himself continued to work out of his home for the most part and came to Court, as he put it,

chiefly to hang his hat and also to take care of the rapidly increasing administrative duties of that office.

When Hugo Black was confirmed as a member of the Court he had the choice of any one of eight suites in the Building, and he wisely selected a very choice corner suite and occupied that space throughout his entire tenure on the Court.

With all his foresight, Chief Justice Taft and the architect were not able to fully anticipate the future needs of the Court, and so about 15 years ago, Justices' chambers were enlarged by converting each of three suites into two and then creating three sets of new chambers.

This required that the Clerk of the Court move from this floor to the ground floor. Previously, Chief Justice Warren had moved the Administrative Office of the United States Courts out of this Building in order to meet the growing needs of the Court itself.

Electric typewriters supplanted the manual power machines, and, in turn, they were recently replaced by word processing machines, which then in turn supplanted the hot lead typesetting process used for preparing the opinions of the Court.

The classical grandeur of this Building has been enhanced by the advent of the Office of the Curator of the Court. Miss Kathy Hetos, the first Curator, served from 1974 to 1976 and was succeeded by Miss Gail Galloway, the present Curator. Working with that man-of-all-skills, Mr. Edward Douglas, a long-time member of the Supreme Court staff, the Lower Great Hall has become a museum of the history of the Court and the history of the Building itself. The work of these people can be observed by those of you who take the time to see the special exhibit that has just been completed on Chief Justice Taft in the Lower Great Hall.

In these efforts to make this great symbol of justice come alive, the cooperation of Mr. George White, the Architect of the Capitol, has been very important. Mr. White turned to architecture only after graduating from the Harvard Law School, and naturally has a sensitive appreciation of both the work of the Architect, Cass Gilbert, and of the law.

The Attorney General and the President of the American Bar Association have alluded to world events occurring soon after the Court sat here, some of them before the Court sat here. Few statesmen of Europe and probably fewer in this country fully understood the meaning of the rise of men like Mussolini and Hitler and the expansion of communism and the other dictatorships of the world of the 1930's.

Whether Chief Justice Taft saw the trends in Europe as undermining justice and were to destroy established systems of freedom, we do not know. What is important was that at a great cataclysmic epoch in history, when dictators first destroyed independent courts and thus left no barriers to protect free speech and free press and other freedoms, this Building became a symbol, as the Attorney General and Mr. Falsgraf have said, not only to Americans but to the whole world, a symbol of the role and the function of a truly independent judiciary.

So, as we pause for an hour to take note of this fiftieth year of a great monument to justice and to freedom under law, we do well to remember both the events of interest in that half century and the meaning in a larger sense, of this edifice as a symbol of a system that has endured for two centuries. With all of the shortcomings of human institutions, our system remains a beacon and a guide to people everywhere who seek freedom.

In laying the cornerstone of the Building, Chief Justice Hughes said: "This Republic endures and this Building is the symbol of its faith."

Mr. Griswold, Mr. Attorney General, Mr. Falsgraf, on behalf of the Court I thank you for your part in this proceeding, the record of which will become part of the permanent records of this Court.

PRESENTATION OF THE SOLICITOR GENERAL

SUPREME COURT OF THE UNITED STATES

MONDAY, NOVEMBER 4, 1985

Present: CHIEF JUSTICE BURGER, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, JUSTICE REHNQUIST, JUSTICE STEVENS, and JUSTICE O'CONNOR.

Mr. Deputy Solicitor General Lawrence G. Wallace presented the Honorable Charles Fried, Solicitor General of the United States.

THE CHIEF JUSTICE said:

Mr. Solicitor General, the Court welcomes you to the performance of the important office that you have assumed, to represent the government before this Court. Your commission will be duly recorded by the Clerk.

DEATH OF JUSTICE STEWART

SUPREME COURT OF THE UNITED STATES

MONDAY, DECEMBER 9, 1985

Present: CHIEF JUSTICE BURGER, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, JUSTICE REHNQUIST, JUSTICE STEVENS, and JUSTICE O'CONNOR.

THE CHIEF JUSTICE said:

It is my sad duty to announce that our distinguished colleague and friend, Justice Potter Stewart, died Saturday, December 7, 1985, in Hanover, New Hampshire.

Justice Stewart served as a Judge of the United States Court of Appeals for the Sixth Circuit from 1954 to 1958 when he was appointed to this Court to succeed Justice Harold Burton. He took office on October 14, 1958, and served as an Associate Justice for 23 years until his retirement in 1981 at the close of the 1980 Term of Court. He had served his country for four years in the United States Navy in World War II.

His appointment to the Court of Appeals in 1954 came at the age of 39, making him the youngest Federal Judge in the country at that time. His opinions on a wide range of subjects appear in nearly 100 volumes of the United States Reports covering a period of great social, political and economic development reflecting the turmoil, upheavals and changes taking place throughout the world.

Those changes had a marked impact on the kinds of issues coming into all courts including this Court. In meeting these issues in the setting of the dramatic changes in the world at large, Justice Stewart exhibited a steadiness of purpose, comprehension and grasp of contemporary law and its antecedents in the Common Law.

His work as a Justice rejected the popular labels and categorizations of judges. Adhering to precedent he sought to resolve cases on narrow grounds leaving related but unresolved issues to the future. He was particularly concerned that the rights of privacy of person and home, protected by the Fourth Amendment, be observed by all levels of government. Few legal issues concerned him more than the protection of the rights envisaged by those who drafted the Constitution and the Bill of Rights.

We mourn Justice Stewart's passing but we will not forget the comradeship and friendship that overshadowed the inescapable differences arising in the processes of resolving the difficult issues that find their way to this Court.

I speak for all members of the Court in expressing our profound sympathy to Mrs. Stewart and her family.

In due course, the traditional memorial service of the Bar of this Court and the Court will be conducted in this Chamber to pay our respects more fully to Justice Stewart.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1985

KENTUCKY *v.* INDIANA ET AL.

ON BILL OF COMPLAINT

No. 81, Orig. Decree entered November 4, 1985

The Report of the Special Master is received and ordered filed. The parties having waived the right to file Exceptions, the Report is adopted.

DECREE

IT IS ORDERED, ADJUDGED, AND DECREED THAT:

1. The boundary line between the State of Indiana and the Commonwealth of Kentucky is fixed as geodetically described in Joint Exhibit 50 to the Special Master's Report filed with this Court on November 4, 1985. Joint Exhibit 50 is incorporated by reference herein.

2. Copies of this Decree and the Special Master's Report (including Joint Exhibits 1–50, inclusive) shall be filed with the Clerk of this Court, the Archives Division of the Indiana Commission on Public Records of Indiana, and the Secretary of State of the Commonwealth of Kentucky.

3. Copies of this Decree and the Special Master's Report (including Joint Exhibit 50 and paper prints of Joint Exhibits 1–49, inclusive, once they become available) shall be filed with the Office of the County Recorder in each of the follow-

ing Indiana counties: the counties of Posey, Vanderburgh, Warrick, Spencer, Perry, Crawford, Harrison, Floyd, Clark, Jefferson, Switzerland, Ohio, and Dearborn; and with the County Clerk's Office in the Commonwealth of Kentucky in each of the following Kentucky counties: the counties of Union, Henderson, Daviess, Hancock, Breckinridge, Meade, Hardin, Jefferson, Oldham, Trimble, Carroll, Gallatin, and Boone.

4. The State of Indiana and the Commonwealth of Kentucky each have concurrent jurisdiction over the Ohio River.

5. The costs of this proceeding shall be divided between the parties as recommended by the Special Master.

CUYAHOGA VALLEY RAILWAY CO. *v.* UNITED TRANSPORTATION UNION ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84–1634. Decided November 4, 1985*

Pursuant to the Occupational Safety and Health Act (Act), the Secretary of Labor issued a citation to Cuyahoga Valley Railway Co. for a violation of the Act; the company contested the citation; the Secretary filed a complaint with the Occupational Safety and Health Review Commission (Commission), and the company filed an answer; and the United Transportation Union, which represents the company's employees, intervened. At the hearing, the Administrative Law Judge (ALJ), over the Union's objection, granted the Secretary's motion to vacate the citation on the ground that the Secretary did not have jurisdiction over the relevant safety conditions. Despite the Secretary's objection, the Commission directed review of the ALJ's order and ultimately remanded the case to the ALJ for consideration of the Union's objections. The Court of Appeals affirmed, holding that, because the adversarial process was well advanced at the time the Secretary attempted to withdraw the citation, the Commission, as the adjudicative body, had the authority to review the Secretary's withdrawal of the citation.

Held: The Secretary has unreviewable discretion to withdraw a citation charging an employer with violating the Act. The Court of Appeals' decision is inconsistent with the detailed statutory scheme, which contemplates that the rights created by the Act are to be protected by the Secretary, and that enforcement of the Act is the Secretary's sole responsibility. The Commission's function is to act as a neutral arbiter and to determine whether the Secretary's citations should be enforced. Its authority does not extend to overturning the Secretary's decision not to issue or to withdraw a citation.

Certiorari granted; 748 F. 2d 340, reversed.

PER CURIAM.

The Secretary of Labor is authorized to inspect work sites to uncover noncompliance with the Occupational Safety and

*Together with No. 85–170, *Brock, Secretary of Labor* v. *United Transportation Union et al.*, also on petition for certiorari to the same court.

Health Act. 29 U. S. C. § 657(a). If, as a result of such an inspection, the Secretary discovers a violation of the Act, he is authorized to issue a citation to the employer fixing a reasonable time for the abatement of the violation, § 658(a), and assessing a penalty for the violation. § 666. The employer then has 15 days in which to contest the citation. § 659(a). Similarly, employees have 15 days in which to challenge as unreasonable "the period of time fixed in the citation for the abatement of the violation." § 659(c). See generally *Whirlpool Corp.* v. *Marshall*, 445 U. S. 1, 9, n. 11 (1980). The statute and rules of the Occupational Safety and Health Review Commission also permit affected employees to participate as parties in any hearing in which the employer contests the citation. 29 U. S. C. § 659(c); 29 CFR § 2200.20(a) (1985).

If an employer contests the citation, and the Secretary intends to seek its enforcement, the Secretary must file a complaint with the Commission within 20 days, and the employer must file an answer within 15 days. 29 CFR § 2200.33 (1985). Once these pleadings are filed, a hearing to determine the validity of the citation will be held before an administrative law judge (ALJ), with discretionary review by the Commission. 29 U. S. C. §§ 659(c), 661(j).

In the present cases, the Secretary cited Cuyahoga Valley Railway Company for a violation of the Act. Cuyahoga contested the citation, the Secretary filed a complaint with the Commission, and Cuyahoga filed an answer. Respondent United Transportation Union, which represents Cuyahoga employees, properly moved to intervene in the proceedings. At the hearing, however, the Secretary moved to vacate the citation on the ground that the Federal Railway Administration, not the Secretary, had jurisdiction over the relevant safety conditions. Despite the Union's objection, the ALJ granted the Secretary's motion and vacated the citation. Thereafter, the Commission directed review of the ALJ's order. The Secretary promptly objected to this action, as-

serting that part of the citation involved matters beyond the reach of the Act and that additional portions of the citation did not warrant litigation because of the state of the evidence. He also stated that the record before the Commission was inadequate to resolve the issue posed.[1] Some six years later, the Commission rejected this submission and remanded the case to the ALJ for consideration of the Union's objections.

The Court of Appeals for the Sixth Circuit affirmed the Commission's holding that it could review the Secretary's decision to withdraw a citation. *Donovan* v. *United Transportation Union*, 748 F. 2d 340 (1984). The court recognized that the Secretary "has the sole authority to determine whether to prosecute" a violation of the Act. *Id.*, at 343. Here, however, the court found that the Secretary "had already made the decision to prosecute by filing a complaint and that complaint had been answered at the time the Secretary attempted to withdraw the citation." *Ibid.* Because the "adversarial process was well-advanced at the time the Secretary attempted to withdraw the citation," the court reasoned that the Commission, "as the adjudicative body, had control of the case and the authority to review the Secretary's withdrawal of the citation." *Ibid.*[2]

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[1] Vacating the citation thus did not rest solely on jurisdictional grounds. Nor did the Court of Appeals' decision sustaining the Commission's order focus on jurisdiction. Its holding would permit review by the Commission of the Secretary's withdrawal of any citation, whatever the reason, provided the adversarial process was sufficiently advanced to vest control in the Commission. For these reasons and because the issue relates to the statutory division of authority between the Secretary and the Commission, rather than the question of judicial review of administrative action, the cases do not pose the question whether an agency's decision, resting on jurisdictional concerns, not to take enforcement action is presumptively immune from judicial review under the Administrative Procedure Act, 5 U. S. C. § 701(a)(2). See *Heckler* v. *Chaney*, 470 U. S. 821, 833, n. 4 (1985).

[2] The Court of Appeals also relied to some extent on the position of the Commission as to the scope of its powers. The Commission, however, has

Contrary to the Sixth Circuit's decision, eight other Courts of Appeals have held that the Secretary has unreviewable discretion to withdraw a citation charging an employer with violating the Occupational Health and Safety Act. *Donovan* v. *Allied Industrial Workers (Midland)*, 760 F. 2d 783, 785 (CA7 1985); *Donovan* v. *Local 962, International Chemical Workers Union (Englehard)*, 748 F. 2d 1470, 1473 (CA11, 1984); *Donovan* v. *International Union, Allied Industrial Workers (Whirlpool)*, 722 F. 2d 1415, 1422 (CA8 1983); *Donovan* v. *United Steelworkers of America (Monsanto)*, 722 F. 2d 1158, 1160 (CA4 1983); *Donovan* v. *Oil, Chemical and Atomic Workers International (American Petrofina)*, 718 F. 2d 1341, 1352–1353 (CA5 1983), cert. denied, 466 U. S. 971 (1984); *Donovan* v. *Occupational Safety and Health Review Comm'n (Mobil Oil)*, 713 F. 2d 918, 926–927 (CA2 1983); *Oil, Chemical and Atomic Workers International* v. *Occupational Safety and Health Comm'n (American Cynamid)*, 217 U. S. App. D. C. 137, 144–145, 671 F. 2d 643, 650–651, cert. denied, 459 U. S. 905 (1982); *Marshall* v. *Sun Petroleum Products Co.*, 622 F. 2d 1176, 1187 (CA3), cert. denied, 449 U. S. 1061 (1980). We agree with the decisions of these courts.

It is apparent that the Court of Appeals' decision is inconsistent with the detailed statutory scheme which contemplates that the rights created by the Act are to be protected by the Secretary. See *Atlas Roofing Co.* v. *Occupational Safety and Health Comm'n*, 430 U. S. 442, 444–447 (1977); *Mobil Oil*, *supra*, at 927; *Sun Petroleum Products*, *supra*, at 1187. It is also clear that enforcement of the Act is the sole responsibility of the Secretary. *Oil, Chemical and Atomic Workers International* v. *Occupational Safety and Health Comm'n*, *supra*, at 143, 671 F. 2d, at 649. It is the Secre-

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since revised its view and now declines to review the Secretary's dismissal of a citation. *Pan American World Airways, Inc.*, 1984 OSHD ¶26,920; *American Bakeries Co.*, 1984 OSHD ¶26,951; *Copperweld Steel Co.*, 1984 OSHD ¶26,956.

tary, not the Commission, who sets the substantive standards for the workplace, and only the Secretary has the authority to determine if a citation should be issued to an employer for unsafe working conditions, 29 U. S. C. § 658. A necessary adjunct of that power is the authority to withdraw a citation and enter into settlement discussions with the employer. *Whirlpool, supra,* at 1420; *Mobil Oil, supra,* at 927. The Commission's function is to act as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections. Its authority plainly does not extend to overturning the Secretary's decision not to issue or to withdraw a citation.

The Sixth Circuit's conclusion that the Commission can review the Secretary's decision to withdraw a citation would discourage the Secretary from seeking voluntary settlements with employers in violation of the Act, thus unduly hampering the enforcement of the Act. *Whirlpool, supra,* at 1420; *Mobil Oil, supra,* at 927. Such a procedure would also allow the Commission to make both prosecutorial decisions and to serve as the adjudicator of the dispute, a commingling of roles that Congress did not intend. *Whirlpool, supra,* at 1419; *Mobil Oil, supra,* at 930–931; *Sun Petroleum Products, supra,* at 1187. Indeed, the Commission itself was created to avoid giving the Secretary both prosecutorial and adjudicatory powers. See generally Senate Committee on Labor and Public Welfare, Subcommittee on Labor, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 (S. 2193, Pub. L. 91–596) (Comm. Print 1971). Accord, *Whirlpool, supra,* at 1419; *Mobil Oil, supra,* at 930–931, and n. 21. The other Courts of Appeals to address this problem have recognized the distinct roles of the Secretary and the Commission and accordingly have acknowledged that the Secretary's decision to withdraw a citation against an employer under the Act is

not reviewable by the Commission. Based on these considerations, the petitions for certiorari are granted, and the judgment of the Court of Appeals is

Reversed.

JUSTICE BRENNAN and JUSTICE BLACKMUN dissent from summary disposition. They would grant certiorari and set the cases for oral argument.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 42, 51–52 (1982) (MARSHALL, J., dissenting).

CALIFORNIA STATE BOARD OF EQUALIZATION ET AL. *v.* CHEMEHUEVI INDIAN TRIBE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85–130. Decided November 4, 1985

Since 1959, California has imposed an excise tax on the distribution of cigarettes, and respondent Chemehuevi Indian Tribe originally remitted the tax to petitioner State Board of Equalization (Board) insofar as the tax was imposed on the distribution of cigarettes to non-Indians who purchased the cigarettes from the Tribe on its reservation in California. However, in 1977 the Tribe enacted its own cigarette tax and ceased collecting and remitting the state tax. When California sought to obtain the unremitted tax, the Tribe filed suit in Federal District Court for injunctive relief and a declaratory judgment that the Board could not lawfully apply the state tax to cigarettes sold by the Tribe to non-Indian purchasers. The court held that the Board's counterclaim for damages in the amount of back taxes allegedly owed by the Tribe was barred by sovereign immunity, but that California could lawfully require the Tribe to collect state taxes imposed on cigarettes that it sold to non-Indians. The Court of Appeals affirmed the first determination, but reversed the second.

Held: The Court of Appeals erred insofar as it held that the Tribe could not be required to collect the tax imposed by California on non-Indian purchasers at tribal smoke shops. It is not necessary that a state cigarette tax statute contain an express statement that the tax is to be passed on to the ultimate purchaser in order for the State to require a tribe to collect the tax from non-Indian purchasers and remit the amounts of such tax to the State. If the legal incidence of the tax falls on non-Indian purchasers, the State may impose on the tribe the burden of collecting the tax. The proper test for determining the legal incidence of the tax is nothing more than a fair interpretation of the taxing statute as written and applied. The fairest reading of California's cigarette scheme as a whole is that the legal incidence of the tax falls on consuming purchasers if the vendors are untaxable, and thus the Board has the right to require the Tribe to collect the tax on the Board's behalf with regard to purchases of cigarettes by non-Indian consumers.

Certiorari granted; 757 F. 2d 1047, reversed in part.

PER CURIAM.

Since 1959 California has imposed an excise tax on the distribution of cigarettes. Respondent Chemehuevi Indian Tribe sells cigarettes on its reservation in southeastern California. The Tribe originally remitted the state tax to petitioner State Board of Equalization (petitioner) insofar as that tax was imposed on the distribution of cigarettes to non-Indian purchasers. But in 1977 the Tribe enacted a cigarette tax of its own that was the equivalent of the California tax, and then ceased collecting and remitting the state tax. When California sought to obtain the unremitted tax from the Tribe, the Tribe brought an action in the United States District Court for the Northern District of California requesting a declaratory judgment that petitioner could not lawfully apply the state tax to cigarettes sold by the Tribe to non-Indian purchasers. Respondent Tribe also sought an injunction preventing petitioner from enforcing the state cigarette tax against it. Petitioner counterclaimed for damages in the amount of back taxes claimed to be owed by respondent Tribe.

The District Court held that petitioner's counterclaim was barred by sovereign immunity, 492 F. Supp. 55 (1979), but also held that California could lawfully require the Tribe to collect cigarette excise taxes imposed on cigarettes that it sold to non-Indians. On appeal, the Court of Appeals affirmed the first determination, but reversed the second. 757 F. 2d 1047 (CA9 1985).

The Court of Appeals observed that, unlike the Washington statute that we considered in *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134 (1980), California's cigarette tax statute "does not contain any . . . *explicit* 'pass-through' language," 757 F. 2d, at 1056 (emphasis added), and that therefore the question of the legal incidence of the California cigarette tax was not controlled by our decision in that case. *Id.*, at 1055–1056. It went on to observe that a "legislative intent to impose even a collection

burden should be *explicitly* stated." *Id.*, at 1056, n. 11 (emphasis added). The Court of Appeals concluded that the California excise tax, properly construed, did not impose liability on the ultimate purchaser of cigarettes when the vendor was not a taxable entity. *Id.*, at 1057, and n. 13.

We think that the Court of Appeals applied a mistaken standard in determining whether or not the California tax on cigarettes was sufficiently like the Washington tax involved in *Colville* so that the result in the latter case should be controlling here. None of our cases has suggested that an express statement that the tax is to be passed on to the ultimate purchaser is necessary before a State may require a tribe to collect cigarette taxes from non-Indian purchasers and remit the amounts of such tax to the State. Nor do our cases suggest that the only test for whether the legal incidence of such a tax falls on purchasers is whether the taxing statute contains an express "pass on and collect" provision. Indeed, the Washington statute in *Colville* did not contain an express pass-through provision; the conclusion of the District Court in that case, which we accepted, was that the statutory scheme required consumers to pay the tax whenever the vendor was untaxable, and thus the legal incidence of the tax fell on purchasers in such cases. 447 U. S., at 142, and n. 9. The test to be derived from cases such as *Colville* and *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U. S. 463, 481–483 (1976), is nothing more than a fair interpretation of the taxing statute as written and applied, without any requirement that pass-through provisions or collection requirements be "explicitly stated." Cf. *United States* v. *Mississippi Tax Comm'n*, 421 U. S. 599, 607–608 (1975).

We think the fairest reading of California's cigarette scheme as a whole is that the legal incidence of the tax falls on consuming purchasers if the vendors are untaxable. California Rev. & Tax Code Ann. §30107 (West 1979) clearly seems to place on consumers the obligation to pay the tax for all previously untaxed cigarettes. The Board's implement-

ing regulation does not restrict this obligation to the hypotheticals contained in the regulation; it merely indicates that the consumer has a duty to pay any tax directly to the Board when the vendor is the type of entity on which the State cannot impose a collection requirement. See Cal. Admin. Register 72, No. 16, Tit. 18, Art. 16, § 4091. The regulation does not address itself to the question of legal incidence. And since both *Colville* and *Moe* hold that if the legal incidence of a state excise tax falls on non-Indian purchasers, the State may impose on the tribe the burden of collecting that tax from the purchasers, 447 U. S., at 159; 425 U. S., at 482–483, this particular regulation is inapplicable to purchasers from Indian tribes if the ultimate liability for the tax falls on the purchaser when the vendor is not taxable. We think that in the context of the entire California statutory scheme, interpreted without any of the restrictive requirements which the Court of Appeals employed, Cal. Rev. & Tax Code Ann. § 30108(a) (West 1979) evidences an intent to impose on the Tribe such a "pass on and collect" requirement. We hold that the legal incidence of California's cigarette tax falls on the non-Indian consumers of cigarettes purchased from respondent's smoke shop, and that petitioner has the right to require respondent to collect the tax on petitioner's behalf.

The petition for certiorari is granted on the first three questions it presents. Insofar as the Court of Appeals held that respondent might not be required to collect the cigarette tax imposed by California on non-Indian purchasers at tribal smoke shops, its judgment is

Reversed.

JUSTICE BRENNAN would deny certiorari.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MAR-

SHALL, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 42, 51–52 (1982) (MARSHALL, J., dissenting).

JUSTICE BLACKMUN would grant certiorari and give the case plenary consideration.

JUSTICE STEVENS, dissenting.

The courts of appeals are better qualified to decide questions of state law than is this Court. Most circuit judges formerly practiced in States within their respective circuits. As judges, they must confront state-law issues on a regular basis. For these reasons, it has long been the settled practice in this Court to show the greatest deference to opinions of the courts of appeals on questions of state law. "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Propper* v. *Clark*, 337 U. S. 472, 486–487 (1949). See also *Haring* v. *Prosise*, 462 U. S. 306, 314, n. 8 (1983) ("a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review"); *Leroy* v. *Great Western United Corp.*, 443 U. S. 173, 181, n. 11 (1979) ("it is not our practice to re-examine state-law determinations of this kind"); *Bishop* v. *Wood*, 426 U. S. 341, 345–347 (1976), and cases cited therein.

The outcome of this case depends entirely on an interpretation of the California Revenue and Taxation Code. I am not prepared to say that the Court of Appeals' construction of the California Code is correct or incorrect.[1] I am prepared,

[1] The Court of Appeals summarized its construction of the California statute as follows:

"Upon careful examination, it is apparent that section 30108(a) is merely a procedural section that denotes the manner in which a vendor shall collect a tax from a purchaser if and when the purchaser is obligated to pay the tax. In the case of a sale with respect to which 'the [usual cigarette] tax imposed by Section 30101 is inapplicable,' the vendor is required to collect the tax from the purchaser either (a) at the time of sale, if the purchaser is

however, to disagree with the Court's conclusion that we should undertake to decide the state-law question in a case of this kind. Even if the Court is correct in its view that the Court of Appeals applied a mistaken standard in construing the California tax,[2] that premise does not justify the action of the Court today in undertaking to decide the state-law issue on its own—particularly when that issue has not been fully briefed and argued. At most, the Court should remand the case to the Court of Appeals for a reconsideration under the proper standard. Such a remand would at least demonstrate that this Court has not forgotten that "federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we" to interpret state law. *Butner* v. *United States*, 440 U. S. 48, 58 (1979). Because the Court's summary disposition conveys a different message, I respectfully dissent.

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then obligated to pay the tax, or (b) if the purchaser is not then obligated to pay the tax, at the time the purchaser becomes so obligated. Cal. Rev. & Tax. Code § 30108(a) (West 1979). Collection by the vendor is mandatory, but only if and when the purchaser has a tax obligation. The section does not contain any substantive provisions that themselves impose any tax or that indicate when section 30101 is inapplicable. Nor does it specify under which situations a purchaser is obligated to pay the tax at the time of sale or, if the purchaser is not then obligated, when the purchaser becomes so obligated. We find no language in section 30108—the only section on which the Board relies for its argument that the incidence of the tax falls upon the purchaser—that remotely suggests a legislative intent to have the purchaser pay the tax whenever the vendor is a non-taxable entity." 757 F. 2d 1047, 1056–1057 (CA9 1985) (footnotes omitted).

[2] The portion of the Court of Appeals opinion which I have quoted in n. 1, *supra*, suggests that the Court of Appeals would have reached the same conclusion even if it had not used the unfortunate word "explicit" earlier in its opinion.

DELAWARE *v.* FENSTERER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

No. 85–214. Decided November 4, 1985

During respondent's murder trial in a Delaware court, the State sought to prove that a cat leash was the weapon used in strangling the victim, and that a hair found on the leash was similar to the victim's hair and had been forcibly removed. The State's expert witness testified that in his opinion the hair had been forcibly removed but stated, on both direct examination and cross-examination, that he could not recall which of three methods he had employed in determining that the hair had been forcibly removed. The trial court overruled respondent's objection that the admission of the expert's testimony precluded adequate cross-examination unless he could testify as to which of the methods he relied upon. The defense offered its own expert, who testified that he had talked earlier with the State's expert and had been informed as to the method employed by the State's expert in reaching his "forcible removal" conclusion. The defense's expert then proceeded to challenge the premise of that method. Respondent was convicted, but the Delaware Supreme Court reversed, holding that because the State's expert was unable to recall the method he used in arriving at his opinion, the admission of the opinion violated respondent's rights under the Confrontation Clause of the Sixth Amendment.

Held:

1. The admission of the State's expert's opinion did not offend the Confrontation Clause despite his inability to recall the basis for that opinion. This case does not fall within the category of Confrontation Clause cases involving the admission of out-of-court statements as substantive hearsay evidence against the defendant and his literal right to "confront" the witness at the time of trial. The State made no attempt to introduce an out-of-court statement by its expert for any purpose, let alone as hearsay. Nor does this case fall within the category of Confrontation Clause cases involving restrictions imposed by law or by the trial court on the scope of cross-examination of prosecution witnesses. The trial court here did not limit the scope or nature of defense counsel's cross-examination of the State's expert. Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination (as in this case), not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.

2. The prosecution's foreknowledge that its expert would be unable to give the precise basis for his opinion did not impose an obligation on it, as a matter of due process, to refrain from introducing the expert's testimony unless the basis for that testimony could definitely be ascertained. Whether or not, under state law, the State's expert's opinion should have been admitted, the Federal Constitution does not forbid the trial court's conclusion that the expert's inability to recall the basis for his opinion went to the weight of the evidence, not its admissibility. The testimony of the defense's expert, suggesting the actual basis for the State's expert's opinion and disputing its validity, dispels any possibility of a claim that the introduction of the State's expert's opinion was so lacking in reliability and so prejudicial as to deny respondent a fair trial.

Certiorari granted; 493 A. 2d 959, reversed and remanded.

PER CURIAM.

In this case, the Delaware Supreme Court reversed respondent William Fensterer's conviction on the grounds that the admission of the opinion testimony of the prosecution's expert witness, who was unable to recall the basis for his opinion, denied respondent his Sixth Amendment right to confront the witnesses against him. 493 A. 2d 959 (1985). We conclude that the Delaware Supreme Court misconstrued the Confrontation Clause as interpreted by the decisions of this Court.

I

Respondent was convicted of murdering his fiancée, Stephanie Ann Swift. The State's case was based on circumstantial evidence, and proceeded on the theory that respondent had strangled Swift with a cat leash. To establish that the cat leash was the murder weapon, the State sought to prove that two hairs found on the leash were similar to Swift's hair, and that one of those hairs had been forcibly removed. To prove these theories, the State relied on the testimony of Special Agent Allen Robillard of the Federal Bureau of Investigation.

At trial, Robillard testified that one of the hairs had been forcibly removed. He explained that, in his opinion, there are three methods of determining that a hair has forcibly

been removed: (1) if the follicular tag is present on the hair, (2) if the root is elongated and misshaped, or (3) if a sheath of skin surrounds the root. However, Robillard went on to say that "'I have reviewed my notes, and I have no specific knowledge as to the particular way that I determined the hair was forcibly removed other than the fact that one of those hairs was forcibly removed.'" *Id.*, at 963. On cross-examination, Agent Robillard was again unable to recall which method he had employed to determine that the hair had forcibly been removed. He also explained that what he meant by "forcibly removed" was no more than that the hair could have been removed by as little force as is entailed in "'brushing your hand through your head or brushing your hair.'" Pet. for Cert. 7. The trial court overruled respondent's objection that the admission of Robillard's testimony precluded adequate cross-examination unless he could testify as to which of the three theories he relied upon, explaining that in its view this objection went to the weight of the evidence rather than its admissibility.

The defense offered its own expert in hair analysis, Dr. Peter DeForest, who agreed with Agent Robillard that the hairs were similar to Swift's. Doctor DeForest testified that he had observed that one of the hairs had a follicular tag. He also testified that he had spoken by telephone with Robillard, who advised him that his conclusion of forcible removal was based on the presence of the follicular tag. App. to Pet. for Cert. D–2. Doctor DeForest then proceeded to challenge the premise of Robillard's theory—that the presence of a follicular tag indicates forcible removal. According to Dr. DeForest, no adequate scientific study supported that premise, and a follicular tag could be attached to hairs that naturally fall out.

On appeal, the Delaware Supreme Court reversed respondent's conviction on the authority of the Confrontation Clause. Noting that "[t]he primary interest secured by the Clause is the right of cross-examination," 493 A. 2d, at 963,

the court reasoned that "[e]ffective cross-examination and discrediting of Agent Robillard's opinion at a minimum required that he commit himself to the basis of his opinion." *Id.*, at 964 (footnote omitted). Absent such an acknowledgment of the basis of his opinion, the court believed that "defense counsel's cross-examination of the Agent was nothing more than an exercise in futility." *Ibid.* Since the court could not rule out the possibility that Robillard could have been "completely discredited" had he committed himself as to the theory on which his conclusion was based, it held that respondent "was denied his right to effectively cross-examine a key state witness." *Ibid.* Accordingly, the court reversed without reaching respondent's additional claim that Robillard's testimony was inadmissible under the pertinent Delaware Rules of Evidence. We now reverse the Delaware Supreme Court's holding that Agent Robillard's inability to recall the method whereby he arrived at his opinion rendered the admission of that opinion violative of respondent's rights under the Confrontation Clause.

II

This Court's Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination. The first category reflects the Court's longstanding recognition that the "literal right to 'confront' the witness at the time of trial . . . forms the core of the values furthered by the Confrontation Clause." *California* v. *Green*, 399 U. S. 149, 157 (1970). Cases such as *Ohio* v. *Roberts*, 448 U. S. 56 (1980), and *Dutton* v. *Evans*, 400 U. S. 74 (1970), gave rise to Confrontation Clause issues "because hearsay evidence was admitted as substantive evidence against the defendants." *Tennessee* v. *Street*, 471 U. S. 409, 413 (1985). Cf. *Bruton* v. *United States*, 391 U. S. 123 (1968).

The second category of cases is exemplified by *Davis* v. *Alaska*, 415 U. S. 308, 318 (1974), in which, although some cross-examination of a prosecution witness was allowed, the trial court did not permit defense counsel to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." As the Court stated in *Davis*, *supra*, at 315, "[c]onfrontation means more than being allowed to confront the witness physically." Consequently, in *Davis*, as in other cases involving trial court restrictions on the scope of cross-examination, the Court has recognized that Confrontation Clause questions will arise because such restrictions may "effectively . . . emasculate the right of cross-examination itself." *Smith* v. *Illinois*, 390 U. S. 129, 131 (1968).

This case falls in neither category. It is outside the first category, because the State made no attempt to introduce an out-of-court statement by Agent Robillard for any purpose, let alone as hearsay. Therefore, the restrictions the Confrontation Clause places on "the range of admissible hearsay," *Roberts*, *supra*, at 65, are not called into play.

The second category is also inapplicable here, for the trial court did not limit the scope or nature of defense counsel's cross-examination in any way. The Court has recognized that "the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but [also] . . . allowed to impeach, *i. e.*, discredit, the witness." *Davis*, 415 U. S., at 316. But it does not follow that the right to cross-examine is denied by the State whenever the witness' lapse of memory impedes one method of discrediting him. Quite obviously, an expert witness who cannot recall the basis for his opinion invites the jury to find that his opinion is as unreliable as his memory. That the defense might prefer the expert to embrace a particular theory, which it is prepared to refute with special vigor, is irrelevant. "'The main and essential purpose of confrontation is *to secure*

for the opponent the opportunity of cross-examination.'" *Id.*, at 315–316 (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940) (emphasis in original)). Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. See *Roberts*, 448 U. S., at 73, n. 12 (even where the only opportunity the defense has to cross-examine the declarant is at a preliminary hearing, except in "extraordinary cases" where defense counsel provided ineffective representation at the earlier proceeding, "no inquiry into 'effectiveness' is required"). This conclusion is confirmed by the fact that the assurances of reliability our cases have found in the right of cross-examination are fully satisfied in cases such as this one, notwithstanding the witness' inability to recall the basis for his opinion: the factfinder can observe the witness' demeanor under cross-examination, and the witness is testifying under oath and in the presence of the accused. See *id.*, at 63, n. 6.

We need not decide whether there are circumstances in which a witness' lapse of memory may so frustrate any opportunity for cross-examination that admission of the witness' direct testimony violates the Confrontation Clause. In this case, defense counsel's cross-examination of Agent Robillard demonstrated to the jury that Robillard could not even recall the theory on which his opinion was based. Moreover, through its own expert witness, the defense was able to suggest to the jury that Robillard had relied on a theory which the defense expert considered baseless. The Confrontation Clause certainly requires no more than this.

Although *Green*, *supra*, involved a witness who professed a lapse of memory on the stand, that case lends no support to respondent. In pertinent part, *Green* was a case in which a minor named Porter informed a police officer of a transaction in which he claimed Green supplied him with drugs. At trial, Porter professed to be unable to recall how he obtained

the drugs. The prosecution then introduced Porter's prior inconsistent statements as substantive evidence. *Green*, 399 U. S., at 152. This Court held that "the Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories." *Id.*, at 164. However, the Court also concluded that, in the posture of that case, it would be premature to reach the question "[w]hether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause . . . ." *Id.*, at 168. In this connection, the Court noted that even some who argue that "prior statements should be admissible as substantive evidence" believe that this rule should not apply to "the case of a witness who disclaims all present knowledge of the ultimate event," because "in such a case the opportunities for testing the prior statement through cross-examination at trial may be significantly diminished." *Id.*, at 169, n. 18 (citations omitted).

We need not decide today the question raised but not resolved in *Green*. As *Green*'s framing of that question indicates, the issue arises only where a "prior statement," not itself subjected to cross-examination and the other safeguards of testimony at trial, is admitted as substantive evidence. Since there is no such out-of-court statement in this case, the adequacy of a later opportunity to cross-examine, as a substitute for cross-examination at the time the declaration was made, is not in question here.

Under the Court's cases, then, Agent Robillard's inability to recall on the stand the basis for his opinion presents none of the perils from which the Confrontation Clause protects defendants in criminal proceedings. The Confrontation Clause includes no guarantee that every witness called by the

prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony. Accordingly, we hold that the admission into evidence of Agent Robillard's opinion did not offend the Confrontation Clause despite his inability to recall the basis for that opinion.

The Delaware Supreme Court also appears to have believed that the prosecution breached its "serious obligation not to obstruct a criminal defendant's cross-examination of expert testimony," 493 A. 2d, at 963, seemingly because the prosecution knew in advance that Agent Robillard would be unable to recall the basis for his opinion when he testified at trial. While we would agree that Robillard's testimony at the *voir dire* examination must be taken to have alerted both the prosecution and the defense to his lapse of memory, see App. to Brief in Opposition A–1, we do not think the prosecution was obliged to refrain from calling Robillard unless it could somehow refresh his recollection. Whether or not, under state law, Robillard's opinion should have been admitted into evidence, nothing in the Federal Constitution forbids the conclusion reached by the trial court in this case: that the expert's inability to recall the basis for his opinion went to the weight of the evidence, not its admissibility. See *United States* v. *Bastanipour*, 697 F. 2d 170, 176–177 (CA7 1982), cert. denied, 460 U. S. 1091 (1983). That being so, the prosecution's foreknowledge that its expert would be unable to give the precise basis for his opinion did not impose an obligation on it, as a matter of due process, to refrain from introducing the expert's testimony unless the basis for that testimony could definitely be ascertained. We need not decide whether the introduction of an expert opinion with no basis could ever be so lacking in reliability, and so prejudicial, as to

deny a defendant a fair trial. The testimony of Dr. DeForest, suggesting the actual basis for Robillard's opinion and vigorously disputing its validity, utterly dispels any possibility of such a claim in this case.

The petition for certiorari is granted, the judgment of the Delaware Supreme Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 42, 51–52 (1982) (MARSHALL, J., dissenting).

JUSTICE BLACKMUN would grant certiorari and give this case plenary consideration.

JUSTICE STEVENS, concurring in the judgment.

Summary reversal of a state supreme court's application of federal constitutional strictures to its own police and prosecutors in novel cases of this kind tends to stultify the orderly development of the law. Because I believe this Court should allow state courts some latitude in the administration of their criminal law,[1] I voted to deny certiorari. Cf. *California* v. *Carney*, 471 U. S. 386, 395 (1985) (STEVENS, J., dissenting).

On the merits, I find the issue much closer to the question reserved in *California* v. *Green*, 399 U. S. 149, 168–170

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[1] In *California* v. *Green*, 399 U. S. 149, 171 (1970), THE CHIEF JUSTICE wrote separately "to emphasize the importance of allowing the States to experiment and innovate, especially in the area of criminal justice." He correctly observed that "neither the Constitution as originally drafted, nor any amendment, nor indeed any need, dictates that we must have absolute uniformity in the criminal law in all the States." *Id.*, at 171–172.

(1970), than does the Court. The question reserved in *Green* concerned the admissibility of an earlier out-of-court statement by the witness Porter of which Porter disclaimed any present recollection at the time of trial.[2] The question decided by the Court today concerns the admissibility of an earlier out-of-court conclusion reached by a witness who disclaims any present recollection of the *basis* for that conclusion. The reasons for carefully reserving the question in *Green* persuade me that this case should not be decided without full argument. Nevertheless, because the Court has granted certiorari and decided to act summarily, because I am not persuaded that the Federal Constitution was violated, and because the State Supreme Court remains free to reinstate its judgment on the basis of its interpretation of state law, I reluctantly concur in the judgment.

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[2] "Whether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause in this case is an issue which is not ripe for decision at this juncture" (footnote omitted). *Id.*, at 168–169. See also *id.*, at 169, n. 18.

LANIER *v.* SOUTH CAROLINA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF SOUTH CAROLINA

No. 85–5260. Decided November 4, 1985

Petitioner, who was convicted of armed robbery, contended that the South Carolina trial court should have suppressed his confession as being the product of an illegal arrest. The South Carolina Court of Appeals affirmed the trial court, holding that, even assuming petitioner's arrest was illegal, the confession was admissible because voluntariness was the test of admissibility and petitioner did not claim that his confession was not voluntary.

Held: The South Carolina Court of Appeals' judgment is vacated, and the case is remanded, because the court's reasoning is inconsistent with well-established precedent holding that a finding of voluntariness of a confession for Fifth Amendment purposes is not by itself sufficient to purge the taint of an illegal arrest, but is merely a threshold requirement for Fourth Amendment analysis.

Certiorari granted; vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted.

Petitioner was convicted of armed robbery. He contends that his confession should have been suppressed because it was the product of an illegal arrest. The South Carolina Court of Appeals affirmed the trial court's rejection of his motion to suppress the confession:

> "Assuming, without deciding, that Lanier's arrest was illegal, we nevertheless hold his confession was admissible. A confession made while the accused is in custody before any warrant for his arrest has been issued is not per se inadmissible. *State* v. *Funchess*, 255 S. C. 385, 179 S. E. 2d 25, *cert. denied*, 404 U. S. 915, 92 S. Ct. 236, 30 L. Ed. 2d 189 (1971). Voluntariness remains as the test of admissibility. *Id.* Even if the arrest was

> illegal, the confession will be admissible if it is freely and voluntarily given. *State* v. *Plath*, 277 S. C. 126, 284 S. E. 2d 221 (1981). Since Lanier does not claim his confession was not voluntary, his argument that the confession was inadmissible is without merit." App. to Pet. for Cert. A–2.

The South Carolina Supreme Court declined further review.

Under well-established precedent, "the fact that [a] confession may be 'voluntary' for purposes of the Fifth Amendment, in the sense that *Miranda* warnings were given and understood, is not by itself sufficient to purge the taint of the illegal arrest. In this situation, a finding of 'voluntariness' for purposes of the Fifth Amendment is merely a threshold requirement for Fourth Amendment analysis." *Taylor* v. *Alabama*, 457 U. S. 687, 690 (1982). See also *Dunaway* v. *New York*, 442 U. S. 200, 217–218 (1979); *Brown* v. *Illinois*, 422 U. S. 590, 602 (1975). . The reasoning of the South Carolina Court of Appeals is inconsistent with those cases. We therefore vacate the judgment and remand the case to that court for further proceedings.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins, concurring in the judgment.

I concur in the judgment of the Court vacating the judgment and remanding this case to the South Carolina Court of Appeals. For the reasons stated in my opinion in *Taylor* v. *Alabama*, 457 U. S. 687, 694 (1982) (O'CONNOR, J., dissenting), I believe the court on remand can consider the timing, frequency, and likely effect of whatever *Miranda* warnings were given to petitioner as factors relevant to the question whether, if petitioner was illegally arrested, his subsequent confession was tainted by the illegal arrest.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits.

See *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 42, 51–52 (1982) (MARSHALL, J., dissenting).

PENNSYLVANIA *v.* GOLDHAMMER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

No. 84–1852. Decided November 12, 1985

Respondent was convicted in a Pennsylvania trial court on multiple counts of theft and multiple counts of forgery. He was sentenced to two-to-five years of imprisonment on a single theft count and five years of probation on one of the forgery counts. Sentence was suspended on the remaining counts. On respondent's appeal, the Pennsylvania Superior Court held that the statute of limitations barred the prosecution of several of the theft counts, including the count on which respondent had received his sentence of imprisonment. On the Commonwealth's appeal, the Pennsylvania Supreme Court affirmed the Superior Court's ruling on the statute of limitations, and denied the Commonwealth's request that the case be remanded to the trial court for resentencing on the remaining theft counts. The court acknowledged that a defendant could be twice sentenced for the same count when there was an intervening retrial at the defendant's request, but it held that resentencing on the counts which were affirmed after an appeal by the Commonwealth was barred by the Double Jeopardy Clause when the sentence of imprisonment on another count was vacated.

Held: The Pennsylvania Supreme Court's rationale was inconsistent with the rationale of the holding in *United States* v. *DiFrancesco*, 449 U. S. 117, that the Double Jeopardy Clause was not violated by 18 U. S. C. § 3576, which allows the United States to appeal to a court of appeals the sentence given a "dangerous special offender" by a district court, and allows the court of appeals to affirm the sentence, impose a different sentence, or remand to the district court for further sentencing proceedings. Since the Pennsylvania Supreme Court in this case held that resentencing was barred by the Double Jeopardy Clause, it did not consider whether Pennsylvania laws in effect at the time allowed the State to obtain review of the sentences on the counts for which the sentence had been suspended. Accordingly, the judgment is reversed, and the case is remanded for a determination of that issue and for further consideration in light of *DiFrancesco*.

Certiorari granted; 507 Pa. 236, 489 A. 2d 1307, reversed and remanded.

PER CURIAM.

The Supreme Court of Pennsylvania held below that the Double Jeopardy Clause of the Fifth Amendment of the

United States Constitution barred the resentencing of respondent. 507 Pa. 236, 489 A. 2d 1307 (1985). We grant certiorari, and, on the basis of our decision in *United States* v. *DiFrancesco*, 449 U. S. 117 (1980), we reverse and remand. The motion of respondent for leave to proceed *in forma pauperis* is granted.

Respondent was convicted in the Philadelphia Court of Common Pleas on 56 counts of forgery and 56 counts of theft. He was sentenced by the trial court to two-to-five years of imprisonment on a single theft count and five years of probation on one of the forgery counts. Sentence was suspended on the remaining counts.

Respondent appealed all 112 convictions to the Superior Court of Pennsylvania. That court ruled that the statute of limitations barred the prosecution of 34 of the theft counts, including the count on which respondent had received his sentence of imprisonment.

On appeal by the Commonwealth, the Supreme Court of Pennsylvania affirmed the Superior Court's ruling on the statute of limitations. In addition, the Supreme Court of Pennsylvania denied petitioner's request that the case be remanded to the trial court for resentencing on the remaining 22 theft counts. The court acknowledged that a defendant could be twice sentenced for the same count when there was an intervening retrial at the request of the defendant, but it held that resentencing on the counts which were affirmed after an appeal by the Commonwealth is barred by the Double Jeopardy Clause when the sentence of imprisonment on another count is vacated. 507 Pa., at 248–251, 489 A. 2d, at 1314–1315, citing *North Carolina* v. *Pearce*, 395 U. S. 711 (1969).

The Pennsylvania Supreme Court's rationale is inconsistent with the rationale of the holding of this Court in *DiFrancesco*, *supra*. In *DiFrancesco* we upheld the constitutionality of 18 U. S. C. §3576, which allows the United States to appeal to the court of appeals the sentence given a "dangerous special offender" by a district court, and allows the court

of appeals to affirm the sentence, impose a different sentence, or remand to the district court for further sentencing proceedings.

We noted that the decisions of this Court "clearly establish that a sentenc[ing in a noncapital case] does not have the qualities of constitutional finality that attend an acquittal." *DiFrancesco*, *supra*, at 134. In *North Carolina* v. *Pearce*, *supra*, we held that a court could sentence a defendant on retrial more severely than after the first trial. Any distinction between the situation in *Pearce* and that in *DiFrancesco* is "no more than a 'conceptual nicety.'" *DiFrancesco*, *supra*, at 136 (quoting *Pearce*, *supra*, at 722). Indeed, a resentencing after an appeal intrudes even less upon the values protected by the Double Jeopardy Clause than does a resentencing after retrial:

> "[T]he basic design of the double jeopardy provision [is to] bar . . . repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent. These considerations, however, have no significant application to the prosecution's statutorily granted right to review a sentence. This limited appeal does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence." *DiFrancesco*, *supra*, at 136.

In *DiFrancesco* a federal statute clearly allowed the appellate review of the sentences at issue. The Court noted that, in light of that statute, the defendant could not claim any expectation of finality in his original sentencing. 449 U. S., at 136, 139. Here, because the Pennsylvania Supreme Court held that resentencing was barred by the Double Jeopardy Clause, there was no need to consider below whether the Pennsylvania laws in effect at the time allowed the State to obtain review of the sentences on the counts for which the sentence had been suspended. We reverse and remand the

case to the Supreme Court of Pennsylvania for a determination of that issue, and for further consideration of this case in light of *DiFrancesco*, *supra*.

Reversed and remanded.

JUSTICE BRENNAN dissents from summary disposition and would vote to deny the petition.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 42, 51–52 (1982) (MARSHALL, J., dissenting).

JUSTICE BLACKMUN would grant the petition and set the case for argument.

JUSTICE STEVENS, dissenting.

In *United States* v. *DiFrancesco*, 449 U. S. 117 (1980), this Court upheld the constitutionality of a federal statute that permitted Government appeals from certain sentences. Today, the Court summarily reverses because it finds that the "Pennsylvania Supreme Court's rationale is inconsistent with the rationale of the holding of this Court in *DiFrancesco*." *Ante*, at 29.

The Pennsylvania Supreme Court opinion does not mention *DiFrancesco*. The appellate briefs before the Pennsylvania court did consider that case, however.[1] Indeed, Mr. Goldhammer argued that *DiFrancesco* did not govern precisely because no Pennsylvania statute authorized government appeals of sentences at the time of his conviction and sentencing.[2] Mr. Goldhammer has raised the same argument

[1] See Brief for Appellant in No. CR 84–1852, p. 13, n. 3; Brief for Appellee in No. CR 84–1852, pp. 13–15.

[2] See *id.*, at 14 ("At the time the instant case arose in Pennsylvania, the Commonwealth did not have the right to appeal from a sentence. That right did not exist until the sentencing guidelines were approved in July, 1982. See 42 Pa. C. S. A. § 9781").

before this Court in his response to the Commonwealth's petition.[3] Moreover, it should be noted that, unlike the situation in *DiFrancesco*, the Pennsylvania prosecutor made no attempt to take an appeal from the sentences imposed by the trial court. The Commonwealth, in its petition and in its reply, has not adequately addressed these points.

The majority recognizes that the Pennsylvania court's judgment may ultimately be supported by state-law grounds. See *ante*, at 30–31. In view of that uncertainty, and in view of the Commonwealth's failure to address this important issue, I would simply deny certiorari.[4] I would presume that the Pennsylvania Supreme Court determined that *DiFrancesco* did not govern for the plausible state-law reason that had been argued to it.

Three factors support this presumption. First, Pennsylvania's current statutory framework for permitting government appeals from sentences was not in place at the time of Mr. Goldhammer's conviction and sentencing.[5] Second, Pennsylvania courts are now applying the new statutory framework,[6] with full knowledge of *DiFrancesco*.[7] Third,

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[3] See Brief in Opposition 9, n. 6 ("At the time of the trial and sentence here, there was no statutory provision in Pennsylvania for appeal of sentences").

[4] See this Court's Rule 21.5 ("The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition").

[5] See 42 Pa. Cons. Stat. § 9781 (1982); 204 Pa. Code § 303.1 *et seq.* (1982), reproduced following Pa. Stat. Ann., Tit. 42, § 9721 (Purdon 1982).

[6] See, *e. g.*, *Commonwealth* v. *Dixon*, 344 Pa. Super. 293, 496 A. 2d 802 (1985); *Commonwealth* v. *Hutchinson*, 343 Pa. Super. 596, 495 A. 2d 956 (1985); *Commonwealth* v. *Drumgoole*, 341 Pa. Super. 468, 491 A. 2d 1352 (1985).

[7] See *Commonwealth* v. *Drumgoole*, *supra*, at 477, n. 2, 491 A. 2d, at 1356, n. 2 ("Appellee also suggests that to grant the relief sought by the Commonwealth 'would appear to be a violation of the Fifth Amendment Constitutional guarantee against double jeopardy.' This argument has

and perhaps most importantly, we should assume that a State Supreme Court is familiar with this Court's precedents and with its own State's law. Because the majority's summary reversal reflects a contrary assumption, I respectfully dissent.

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been resolved contrary to appellee's claim. *United States* v. *DiFrancesco*, 449 U. S. 117 . . .").

PENNSYLVANIA BUREAU OF CORRECTION *v.* UNITED STATES MARSHALS SERVICE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84–489. Argued October 15, 1985—Decided November 18, 1985

A Pennsylvania state prisoner temporarily confined in the Philadelphia County jail brought suit in Federal District Court under 42 U. S. C. § 1983 against various county officials, alleging that they had beaten and harassed him. The court assigned the action to a Magistrate, who issued writs of habeas corpus *ad testificandum* for the producing of state prisoners, including the plaintiff, as witnesses. The order directed the state Wardens to transport the prisoners to the county jail nearest the federal court, and then directed the United States Marshals Service (respondent) to transport the prisoners from the county jail to the federal court. Respondent's motion for reconsideration of the latter part of the order was denied. The Court of Appeals reversed in pertinent part, holding that the All Writs Act did not confer power on the District Court to compel noncustodians to bear the expense of producing the prisoner-witnesses.

Held: There is no statutory authority for the order in question. Pp. 37–43.

(a) Title 28 U. S. C. §§ 567 and 569(b) merely enumerate respondent's obligations to obey a federal court's mandate and to transport prisoners if the court so orders. The court's authority to issue such mandates must derive from some independent source. Pp. 37–38.

(b) The habeas corpus statutes—28 U. S. C. §§ 2241(c)(5) and 2243—do not authorize a federal court to direct a writ *ad testificandum* to parties who do not have custody of the prisoner. There is no evidence in the language of §§ 2241 and 2243, in their legislative history, or in the common-law writ *ad testificandum* that courts are empowered to cause third parties who are neither custodians nor parties to the litigation to bear the cost of producing the prisoner in federal court. Nor does *Carbo* v. *United States*, 364 U. S. 611, support an expansive reading of the power conferred upon federal district courts by the writ of habeas corpus *ad testificandum*. Pp. 38–39.

(c) The All Writs Act does not confer authority upon a federal court to issue an order such as the one at issue. An examination of the Act, its legislative history, and this Court's past interpretations of the Act all support this conclusion. Although the Act empowers federal courts to

fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate. Pp. 40–43.

737 F. 2d 1283, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 43.

Leroy S. Zimmerman, Attorney General of Pennsylvania, argued the cause for petitioner. With him on the briefs were *Maria Parisi Vickers*, *Andrew S. Gordon*, and *Allen C. Warshaw*, Senior Deputy Attorneys General.

Mark I. Levy argued the cause for respondents. With him on the brief were *Acting Solicitor General Fried*, *Acting Assistant Attorney General Willard*, *Deputy Solicitor General Geller*, and *Barbara L. Herwig*.

JUSTICE POWELL delivered the opinion of the Court.

The question presented is whether a United States district court may compel the United States Marshals Service to transport state prisoners to the federal courthouse to testify in an action brought under 42 U. S. C. § 1983 by a state prisoner against county officials.

I

In June 1980, Richard Garland brought suit under 42 U. S. C. § 1983 against various Philadelphia County officials in the United States District Court for the Eastern District of Pennsylvania, alleging that he had been beaten and harassed by the defendant deputy sheriffs and prison guards. At the time Garland filed this suit, he was incarcerated in the Philadelphia County jail, but was subsequently transferred to a state facility. The District Court assigned the action to a Magistrate for disposition on the merits.

In December 1982, the Magistrate issued writs of habeas corpus *ad testificandum* to produce five witnesses, including plaintiff Garland. At that time, Garland was in a state cor-

rectional facility in Huntingdon, approximately 220 miles from Philadelphia. The other four witnesses were all confined in state facilities over 100 miles from Philadelphia. The orders directed the Wardens of the state facilities to transport inmates from state prison to the county jail nearest the federal courthouse in Philadelphia. The orders then commanded the United States Marshals Service (Marshals)[1] to transport the inmates from that county facility to the federal court and to maintain custody of them during trial. The Marshals unsuccessfully moved for reconsideration of that portion of the order that directed them to transport the state prisoners from the county jail to the federal courthouse and to guard them during trial.

On the Marshals' appeal from this denial, the Court of Appeals for the Third Circuit reversed in part, holding that the All Writs Act did not confer power upon the District Court "to compel *non-custodians* to bear the expense of [the production of witnesses] simply because they have access to a deeper pocket." *Garland* v. *Sullivan*, 737 F. 2d 1283, 1287 (1984) (emphasis in original).[2] The Court of Appeals did find, however, that the District Court has the power to compel the Marshals to take custody of state prisoners while those prisoners are in the federal courthouse in connection

[1] The Marshals are within the Executive Branch of the Federal Government. The Marshal for each district is appointed by the President, 28 U. S. C. § 561(a), is subject to the supervision and direction of the Attorney General, see, *e. g.*, §§ 562, 567, 569(c), 571(a) and (d), and is funded through Department of Justice appropriations, *e. g.*, § 567.

[2] Judge Becker concurred in the judgment, believing the court to be bound by *McClung* v. *Silliman*, 6 Wheat. 598 (1821), and *McIntire* v. *Wood*, 7 Cranch 504 (1813). He hoped that this Court would "find that, because statutes can adapt to fit the needs of changing times, the All Writs Act now permits what, in the time of *McIntire* and *McClung* it did not." 737 F. 2d, at 1292 (footnote omitted). Judge Atkins, sitting by designation from the Southern District of Florida, concurred in part and dissented in part, believing that the Third Circuit could impose a duty on the Marshals to transport state prisoners. *Ibid.*

with federal judicial proceedings. *Ibid.* Finally, the court held that the District Court could order the Marshals to take custody of state prisoners if the trial court made a specific finding that special security risks required that state prisoner-witnesses be in the Marshals' custody away from the federal courthouse. *Id.*, at 1289.

The Commonwealth Bureau of Correction (Commonwealth) petitioned this Court for a writ of certiorari on the question whether a federal court can command the Marshals to share responsibility with state officials for transporting state inmates to the federal courthouse when neither the State nor any state official is a party.[3] Because this case presents a recurrent problem on which the Circuits differ, we granted the writ. 469 U. S. 1206 (1985). We find that there is no statutory authority for a United States district court to command the Marshals to take custody of state prisoners outside the federal courthouse during the normal course of producing state prisoner-witnesses for trial, and accordingly affirm.

II

The Commonwealth argues that the Marshals have a statutory obligation to obey the lawful orders and writs of the federal courts, 28 U. S. C. § 569(b), and are statutorily authorized to expend funds for the specific purpose of transporting prisoners, § 567. It also contends that these provisions recognize the authority of the district courts to seek assistance from the Marshals. Two Circuits have summarily agreed. *Ford* v. *Allen*, 728 F. 2d 1369, 1370 (CA11 1984) *(per curiam); Ballard* v. *Spradley*, 557 F. 2d 476, 481 (CA5 1977). Two other Circuits have relied in part on these provisions in

[3] The propriety of that part of the order commanding the Marshals to take custody of the state prisoners while they are in the federal courthouse is not specifically before us. The Marshals have conceded that they are responsible for the custody of state prisoners in the federal courthouse as witnesses or parties.

imposing the responsibility for transport upon the Marshals. *Wiggins* v. *County of Alameda*, 717 F. 2d 466 (CA9 1983), cert. denied *sub nom. California Dept. of Corrections* v. *United States*, 465 U. S. 1070 (1984); *Ford* v. *Carballo*, 577 F. 2d 404 (CA7 1978). The Court of Appeals for the Third Circuit is the only Circuit to deny a district court authority to compel the Marshals to assist in transporting state prisoner-witnesses to the federal courthouse.

Sections 569(b) and 567 merely enumerate obligations of the Marshals. The Marshals must obey the mandates of federal courts and transport prisoners if the court so orders. The courts' authority to issue such writs, however, must derive from some independent statutory source. We therefore must look to the habeas corpus statute or the All Writs Act to see if they authorize federal courts to order the transportation of state prisoners to the federal courthouse.

III

The Court of Appeals reasoned that the Magistrate's order amounted to a writ of habeas corpus *ad testificandum*[4] properly directed only to the custodian, and that there was no basis in the habeas corpus statute for the District Court's authority to direct a writ *ad testificandum* to a noncustodian. We agree.

Since 1867, the writ of habeas corpus has incorporated the common-law command that the writ "*shall* be directed to the person in whose custody the party is detained." Act of Feb. 5, 1867, ch. 28, 14 Stat. 386 (emphasis added). See *In re Thaw*, 166 F. 71, 74–75 (CA3 1908). It was the custodian who then was to "make return of said writ and bring the party before the judge who granted the writ." *Ibid.* Con-

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[4]The habeas corpus statute provides in pertinent part that the writ "shall be directed to the person having custody of the person detained," and that "the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained." 28 U. S. C. § 2243.

gress preserved this unambiguous directive throughout subsequent revisions, and the current habeas corpus statute states that the writ "shall be directed to the person having custody of the person detained." 28 U. S. C. § 2243. Section 2243 also specifically provides that "the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained."

The language of the statute thus expressly commands the custodian to bring his prisoner to the court, but extends this duty to no other. See also Fed. Rule Civ. Proc. 81(a)(2) ("The writ of habeas corpus . . . shall be directed to the person having custody of the person detained"). We find no evidence in the language of §§ 2241 and 2243, in their legislative history, or in the common-law writ *ad testificandum* to suggest that courts are also empowered to cause third parties who are neither custodians nor parties to the litigation to bear the cost of producing the prisoner in a federal court. We therefore conclude that there is no basis in the habeas corpus statute for a federal court to order the Marshals to transport state prisoners to the federal courthouse.[5]

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[5] *Carbo* v. *United States*, 364 U. S. 611 (1961), does not support an expansive reading of the power conferred upon federal district courts by the writ of habeas corpus *ad testificandum*. In *Carbo*, the Court found that although § 2241 contained an express territorial limitation of "[w]rits of habeas corpus," 28 U. S. C. § 2241(a), the limitation applied to habeas corpus *ad subjiciendum*, but not to habeas corpus *ad prosequendum*. The Commonwealth similarly argues that the provisions in § 2243 that direct the custodian to produce the prisoners in court do not apply to the writ *ad testificandum* but instead are limited to the Great Writ, habeas corpus *ad subjiciendum*.

Carbo's expansive reading of the statute was consistent with common-law procedure and requirements applied to the writ *ad prosequendum* and with the legislative history of § 2241(a). 364 U. S., at 615–618. But this case involves the writ *ad testificandum*, which has been confined in its application to the actual custodian of the prisoners from before its initial codification in 1789 to the present. We therefore do not believe that *Carbo* justifies a more expansive view of the writ of habeas corpus *ad testificandum* today.

IV

Finally, the Commonwealth argues that the All Writs Act, 28 U. S. C. § 1651,[6] confers authority upon a district court to order the Marshals to transport state prisoners to and from the federal courthouse in connection with federal litigation. It argues that the "deluge of . . . civil rights actions" calls for "creative" use of federal judicial power to alleviate the drain on the States' fiscs from the transport of inmates to and from federal courthouses.

It is true that this Court consistently has construed the All Writs Act to authorize a federal court "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States* v. *New York Telephone Co.*, 434 U. S. 159, 172 (1977). This Court also has held that the supplemental powers of the Act are not limited to situations where it is "necessary" to issue the writ or order "in the sense that the court could not otherwise physically discharge its appellate duties." *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 273 (1942). An examination of the language of the All Writs Act, its legislative history, and our decisions construing it convinces us, however, that the Act does not authorize a district court to order the Marshals to transport state prisoners from state prisons to the federal courthouse in the ordinary course of litigation in federal courts.

The All Writs Act originally was codified in § 14 of the Judiciary Act of 1789, 1 Stat. 81–82, which provided that

> "all the . . . courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specifically provided for by statute,

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[6] The All Writs Act provides in pertinent part:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

> which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

Our early view of the scope of the all writs provision confined it to filling the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction. *McClung* v. *Silliman*, 6 Wheat. 598 (1821); *McIntire* v. *Wood*, 7 Cranch 504 (1813). This limitation is especially significant in construing federal courts' power to issue writs of habeas corpus *ad testificandum:* The Judiciary Act of 1789 codified the *ad testificandum* writ in the same section as the all writs provision.

The original phrase "not specifically provided for by statute" remained in the all writs section until 1948. Although the legislative history is scant, it appears that Congress then merely consolidated various provisions into § 1651 and made "necessary changes in phraseology" without substantive amendment. See H. R. Rep. No. 308, 80th Cong., 1st Sess., A144 (1947); see also *id.*, at 5. The legislative history did, however, state that the new section was "expressive of the construction recently placed upon [the all writs provision] by the Supreme Court in *U. S. Alkali Export Assn.* [v. *United States*, 325 U. S. 196 (1945)]." *Id.*, at A145. In *United States Alkali*, the Court rejected use of the all writs provision to enable the Court to review a lower court's determination where jurisdiction did not lie under an express statutory provision. Chief Justice Stone wrote:

> "The writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews." 325 U. S., at 203.

Although Congress dropped the phrase "not specifically provided for by statute" in its 1948 consolidation, we conclude that it apparently intended to leave the all writs provision substantially unchanged. That intention and the favorable reference to *United States Alkali* convince us that the 1948 changes in phraseology do not mark a congressional expansion of the powers of federal courts to authorize issuance of any "appropriate" writ.

Nevertheless, the Commonwealth, relying on *United States* v. *New York Telephone Co.*, *supra*, at 171, as well as *Harris* v. *Nelson*, 394 U. S. 286, 299 (1969), and *Price* v. *Johnston*, 334 U. S. 266, 282 (1948), insists that under the All Writs Act the District Court can order the Marshals to transport state prisoners upon a mere statement that such an order would be "necessary or appropriate." As summarized in the margin below, these cases are clearly distinguishable and lend little support to the Commonwealth's argument.[7]

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[7] In *United States* v. *New York Telephone Co.*, 434 U. S. 159 (1977), the Court held that a District Court could under the All Writs Act compel a third party, the New York Telephone Company, to assist the Federal Bureau of Investigation in installing devices under a warrant that would register the numbers dialed on certain telephones. In that case the All Writs Act filled a gap in federal statutes by granting the District Court jurisdiction over the only party capable of installing the devices. In the instant case, by contrast, the habeas corpus statute already expressly provides for the issuance of a writ "to the person having custody of the person detained."

In *Price* v. *Johnston*, 334 U. S. 266 (1948), the Court held that a Court of Appeals could order a prisoner to be brought before it to argue his own appeal, finding that the All Writs Act was a mechanism to achieve the "rational ends of law." *Id.*, at 282. In *Price*, however, there was no alternative way to bring the prisoner before the court. In the present case, the traditional writ *ad testificandum* is sufficient. Similarly, *Harris* v. *Nelson*, 394 U. S. 286 (1969), held that the District Court in that case had no alternative means of providing an effective habeas corpus proceeding except by use of an extraordinary writ. *New York Telephone*, *Price*, and *Harris* afforded resort to the All Writs Act to fill statutory interstices. We do not find their reasoning controlling here, where a writ *ad testifican-*

The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate. We need not categorically rule out reliance on the All Writs Act and the use of Marshals in procuring or safeguarding state prisoner-witnesses in the course of federal litigation. There may be exceptional circumstances in which a district court can show clearly the inadequacy of traditional habeas corpus writs, such as where there are serious security risks. In such circumstances, a district court may find it "necessary or appropriate" for Marshals to transport state prisoners. We therefore leave open the question of the availability of the All Writs Act to authorize such an order where exceptional circumstances require it.

V

We conclude, at least in the absence of an express finding of exceptional circumstances, that neither a magistrate nor a district court has authority to order the Marshals to transport state prisoners to the federal courthouse to testify in an action brought by a state prisoner under 42 U. S. C. § 1983 against county officials. Accordingly, we affirm the Court of Appeals for the Third Circuit.

It is so ordered.

JUSTICE STEVENS, dissenting.

This is an exceptional case. It involves a dispute between the Marshals Service and a Federal District Court. Ordinarily, the marshals and the federal courts which they serve

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dum directed to the custodian indisputably provides a district court with a means of producing a prisoner-witness.

have a close and harmonious relationship. To be sure, the special responsibilities of the marshal—an office that serves both the Executive and Judicial Branches—can give rise to administrative problems.[1] Customarily such problems are resolved on a voluntary, cooperative basis, either in the individual court or circuit, or in high-level discussions between the Executive and Judicial Branches.[2] Open disputes between the marshals and the courts are rare, and appropriately so.

The question whether federal marshals should be required to transport state prisoners to testify in federal litigation is, however, a recurring problem that has not been resolved amicably, either between the federal courts and the marshals[3] or between the marshals and the States.[4] The majority notes that, in "exceptional circumstances," *ante*, at 43, the district court may order marshals to transport state prisoners. I entirely agree. The majority's holding, however, is that, absent such circumstances, the district court may not

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[1] See Report by the Comptroller General, U. S. Marshals' Dilemma: Serving Two Branches of Government (1982).

[2] See, *e. g.*, U. S. Marshals Service, Oversight Hearing before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 99th Cong., 1st Sess., 3 (1985) (citing agreement between the Attorney General and THE CHIEF JUSTICE regarding court security); *id.*, at 26 (citing agreement between the Attorney General and THE CHIEF JUSTICE regarding contract guard program); Hearings on H. R. 7039 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 97th Cong., 2d Sess., 175 (1982) (citing agreement between the Attorney General and THE CHIEF JUSTICE regarding court security and the allocation of marshals).

[3] See *Ford* v. *Allen*, 728 F. 2d 1369 (CA11 1984) *(per curiam)*; *Wiggins* v. *County of Alameda*, 717 F. 2d 466 (CA9 1983), cert. denied, 465 U. S. 1070 (1984); *Ford* v. *Carballo*, 577 F. 2d 404 (CA7 1978); *Ballard* v. *Spradley*, 557 F. 2d 476 (CA5 1977).

[4] See *Wiggins* v. *County of Alameda*, 717 F. 2d, at 469 ("We decry the inability of state and federal officials to resolve such matters fairly and equitably . . .").

order marshals to do so because no statute expressly authorizes that action. In my view, this conclusion ignores the importance of history and tradition in defining the relationship between the Marshals Service and the Federal Judiciary.

History and tradition suggest that the court's authority over the marshal is not so narrowly circumscribed as the Court suggests. In the Judiciary Act of 1789, Congress placed the marshal under the direction of the court. Because the office of the marshal was patterned after the office of the common-law sheriff,[5] there was no need for Congress to define the judge's authority to issue orders to the marshal with any particularity. Instead, § 27 of the Judiciary Act of 1789 provided that a marshal should be appointed in each

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[5] See U. S. Dept. of Justice, United States Marshals Service—Then . . . and Now 3 (1978) ("the Marshal carried on the tradition of the English common law sheriff, possessing complete authority within his bailiwick"). Indeed, one of the objections expressed to the Judiciary Act of 1789 was that it would lead to conflicts between the federal marshals and the local sheriffs. 1 Annals of Cong. 826 (1789) (statement of Rep. Stone) ("in different tribunals, not connected, mischiefs may happen. Will a sheriff be justifiable in delivering up his prisoner to the marshal, or will it be a proper return by the marshal that the prisoner is kept by the State sheriff"). In 1792, moreover, Congress expressly provided that "the marshals of the several districts and their deputies, shall have the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states," 1 Stat. 265—a provision that, in substance, exists today, 28 U. S. C. § 570. On the power of the sheriff at English common law, see G. Atkinson, Sheriff-Law 5 (1861) ("The sheriff is the immediate officer to *all* the Courts at Westminster to execute writs. . . . [W]hether a writ comes to him, by authority, or without authority, or is awarded against whom it does not lie, he cannot doubt, or dispute its validity").

The title for the marshals may have been derived from the example of the marshals to the British and colonial vice-admiralty courts. See L. Ball, The United States Marshals of New Mexico and Arizona Territories 3 (1978). See also C. Ubbelohde, The Vice-Admiralty Courts and the American Revolution 10 (1960) (In the colonial vice-admiralty courts, "[t]he marshals' duties were similar to those of a sheriff: serving processes, taking custody of goods or people, and executing the decrees of the court").

judicial district.[6] The primary duty of the marshal, as expressed in that Act, was "to attend the district and circuit courts when sitting therein, and also the Supreme Court in the district in which that court shall sit." In carrying out his duty to execute "all lawful precepts directed to him," each marshal was given the power to appoint "one or more deputies," but such deputies were removable at will by the appropriate federal judge. Read against the background of the relationship between the judge and the sheriff that had existed at common law, it is evident that the statute simply assumed that the judge had ample power to call upon the marshal for appropriate assistance in carrying out the duties of judicial office.

Although the marshal was subsequently given a variety of other duties, including some subject to direction from the

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[6] "SEC. 27. *And be it further enacted*, That a marshal shall be appointed in and for each district for the term of four years, but shall be removable from office at pleasure, whose duty it shall be to attend the district and circuit courts when sitting therein, and also the Supreme Court in the district in which that court shall sit. And to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty, and to appoint as there shall be occasion, one or more deputies, who shall be removable from office by the judge of the district court, or the circuit court sitting within the district, at the pleasure of either; and before he enters on the duties of his office, he shall become bound for the faithful performance of the same, by himself and by his deputies before the judge of the district court to the United States, jointly and severally, with two good and sufficient sureties, inhabitants and freeholders of such district, to be approved by the district judge, in the sum of twenty thousand dollars, and shall take before said judge, as shall also his deputies, before they enter on the duties of their appointment, the following oath of office: 'I, A. B., do solemnly swear or affirm, that I will faithfully execute all lawful precepts directed to the marshal of the district of under the authority of the United States, and true returns make, and in all things well and truly, and without malice or partiality, perform the duties of the office of marshal (or marshal's deputy, as the case may be) of the district of , during my continuance in said office, and take only my lawful fees. So help me God.'" 1 Stat. 87.

Executive Branch,[7] it was not until 1861 that Congress gave the Attorney General any authority over United States marshals.[8] Furthermore, it was not until 1969 that the Attorney General formalized his control over the marshals through the establishment of the Office of the Director of the Marshals Service.[9]

Under the current statutory framework, the United States marshals owe obligations both to the Executive Branch and to the Judiciary. Thus, although as the majority points out, the Marshals Service is under the control of the Attorney General, *ante*, at 36, n. 1, marshals also remain subject to the instructions of the court.[10] Indeed, Congress has considered, but not passed, legislation to lodge control of the marshals exclusively in the Executive Branch.[11] Thus, Congress has not yet divested the Judiciary of the control of marshals that it has had since 1789, and that it has shared with the Attorney General since 1861.

Throughout our history, the marshals have played an important role in the administration of justice. Although their most dramatic exploits may be called to mind by references to names like Bat Masterson, Wyatt Earp, and David Neagle, or to events like the enforcement of civil rights legislation in the 1960's, the primary assistance to the Federal Judiciary provided by the marshals has been in the area of

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[7] See U. S. Dept. of Justice, The Office of the United States Marshal 2–3 (1981).

[8] See Report by the Comptroller General, *supra* n. 1, at 8 ("On August 2, 1861, an act of Congress (ch. 37, 12 Stat. 285) placed U. S. attorneys and marshals under the general superintendence and direction of the Attorney General. The 1861 legislation neither explicitly repealed nor made reference to any prior statutes affecting marshals").

[9] *Id.*, at 10.

[10] See 28 U. S. C. § 569(a) ("The United States marshal of each district is the marshal of the district court and of the court of appeals when sitting in his district, . . . and may, in the discretion of the respective courts, be required to attend any session of court").

[11] See Hearings on H. R. 7039, *supra* n. 2, at 141.

protection of the trial process, including the courtroom itself, and the service of writs issued by the judges. The duty of the Marshals Service "to service the federal forum"[12] does, however, encompass more than these two specific activities.

Many aspects of the court's authority over the marshal are not set forth in detail in any Act of Congress. Thus, it is not the Congress that decided that formal proceedings in our courtroom shall be preceded by the Marshal's cry of "Oyez, Oyez." Nor is it Congress, or the United States Marshals Service, that has decided to use different language to call the court to order in other federal courthouses. Decisions of that kind concerning the administration of justice in federal courts are made by federal judges.

When a federal judge orders the marshal to open court at a particular time, or in a particular way, to provide appropriate security for a trial participant, or to escort a prisoner from the lockup in the federal building to the courtroom, the court is exercising judicial power in a manner that is certainly "agreeable to the usages and principles of law" as that phrase is used in the All Writs Act.[13] In my judgment, however, such an order is not a "writ." The court's authority to issue such directives to the marshal is therefore not derived from the All Writs Act, but rather is simply one of the powers of the federal judicial office that has long been an aspect of the relationship between the court and its officers.

These daily instances of judicial authority over the marshal reflect the conventional relationship between the court and the marshal. The closeness of the relationship is derived, not from an assertion of judicial power over an unwilling marshal, but from the cooperative nature of the shared mission to administer justice. This case represents one of those un-

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[12] "The *raison d'etre* of the Marshal Service is to service the federal forum in civil as well as criminal litigation." *Ballard* v. *Spradley*, 557 F. 2d, at 481.

[13] The statute's original and present forms are both quoted by the Court, *ante*, at 40–41, and n. 6.

usual instances in which the ordinary mechanisms for addressing disagreements have apparently failed. The majority holds that the answer must be found in an explicit statutory delineation of each exercise of judicial authority. In my view, the nature of the shared mission of the federal courts and the federal marshals should provide the standard for resolving the dispute. Thus, the controlling question is whether the district court's order is reasonably related to the administration of justice and is a sound exercise of judicial discretion.[14]

As noted, the Court recognizes that there may be "exceptional circumstances" in which it would be appropriate for a trial court to order the marshal to transport a state prisoner to a federal courthouse. See *ante*, at 43. In my judgment, even with respect to an ordinary witness, special circumstances might make it appropriate to order the marshal to transport the witness to court, even though there may not be any common-law writ that would be available in a comparable situation. The question whether such an order to a marshal constitutes an appropriate exercise of the judge's inherent power to control the course of proceedings in a particular trial should not, in my opinion, be answered by reference to the All Writs Act, but rather by reference to the traditional relationship between the court and the marshal and to the particular facts that may support the order in a particular case.

In this case, four factors suggest that ordering the federal marshal to transport the state prisoners was a sound exercise of judicial discretion. First, federal marshals have consider-

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[14] Four of the five United States Courts of Appeals that have considered federal-court orders to transport state prisoners for their testimony in federal litigation have viewed the issue as a question of the District Court's discretion, and located the authority for that discretion in a specific statutory provision. See cases cited in n. 3, *supra*.

able expertise in transporting prisoners to federal courts;[15] moreover, the marshals acknowledge that they have ample authority to transport state, as well as federal, prisoners when appropriate.[16] Second, in this instance, the federal marshal will be responsible for the prisoners when they are in the federal courthouse.[17] Third, federal marshals frequently house federal prisoners at state and local jails, and, indeed, have developed special programs to serve that end.[18] Fourth, in this case, the District Court, through the Magistrate, specifically found that requiring the State to bear the entire responsibility of transporting the state prisoners for this federal litigation would impose an unfair financial hardship upon the Commonwealth of Pennsylvania.[19] This finding derives support, not only from the particular facts disclosed by this record,[20] but also from the strong federal policy

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[15] The marshals transported more than 130,000 prisoners in fiscal year 1984. Oversight Hearing, *supra* n. 2, at 10.

[16] See Tr. of Oral Arg. 38–40.

[17] See *ante*, at 37, n. 3.

[18] Oversight Hearing, *supra* n. 2, at 16.

[19] See Magistrate's opinion, App. to Pet. for Cert. 58a–59a. The Magistrate ordered the Marshals Service to transport the prisoners from the Philadelphia Detention Center to the federal courthouse in Philadelphia. The State, in contrast, remained responsible for transporting the prisoners from their prisons in other parts of the State to the Philadelphia Detention Center. *Id.*, at 58a.

[20] The Magistrate found that the financial costs imposed by his requirement that the State transport the prisoners to the Philadelphia Detention Center were "significant," *id.*, at 59a. Determining that it was "equitable and reasonable," *ibid.*, to refrain from imposing additional costs on the State, he emphasized that the Marshal already made frequent trips from the Philadelphia Detention Center to the federal courthouse because federal prisoners were often housed at the Detention Center during their federal trials. *Id.*, at 60a. According to the Magistrate's findings, the Detention Center is "relatively close" to the federal courthouse. *Id.*, at 59a–60a. At oral argument, the Federal Government reported that "the Marshal typically brings between six and twelve prisoners from the Philadelphia Detention Center to the Federal Courthouse on an average day." Tr. of Oral Arg. 28.

favoring cooperation with the States in the administration of civil rights litigation in the federal courts.[21] Thus, I believe that it was an appropriate exercise of the District Court's discretion to issue the order that it did in this case.

This is not the kind of confrontation that should arise between the marshals and the federal courts. There are a variety of mechanisms that should be used before the marshals and the courts engage in judicial combat. The district judges and the individual marshals should be able to resolve most difficulties. If they are unable to, the Circuit Conference should be asked to intervene. If the problem is a recurring, national disagreement, as this issue seems to be, the Marshals Service and the Judicial Conference can seek to address it. If these mechanisms fail, however, and if the district court issues an order to the marshal, then the historic relationship between the marshal and the courts, reflected in the current statutory framework, convinces me that the court's order should be upheld if it is reasonably related to the administration of justice and is an appropriate exercise of the district court's discretion.

Because I believe that the District Court's order in this case was fully consistent with the historic relationship between the federal court and the federal marshal, I respectfully dissent.

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[21] Cf. Remarks of Warren E. Burger, Chief Justice of the United States, at the Dedication of the National Center for State Courts 8 (1978) ("I would hope that there will be close cooperation and coordination between our two systems—close, I repeat, but voluntary. Our experience with the State-Federal Councils has shown us the value of cooperation").

HILL *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-1103. Argued October 7, 1985—Decided November 18, 1985

Pursuant to a plea-bargaining agreement, petitioner pleaded guilty in an Arkansas court to charges of first-degree murder and theft of property, and the court accepted the plea, sentencing him, in accordance with the State's recommendations, to concurrent sentences of 35 years for the murder and 10 years for the theft. Petitioner later filed a federal habeas corpus petition alleging, *inter alia*, that his guilty plea was involuntary by reason of ineffective assistance of counsel because his court-appointed attorney had misinformed him that if he pleaded guilty he would become eligible for parole after serving one-third of his prison sentence, whereas under Arkansas law petitioner, as a "second offender," was required to serve one-half of his sentence before becoming eligible for parole. The District Court denied habeas relief without a hearing, and the Court of Appeals affirmed.

Held: The District Court did not err in declining to hold a hearing on petitioner's claim. Pp. 56–60.

(a) Where a defendant enters a guilty plea upon counsel's advice, the voluntariness of the plea depends on whether the advice was within the range of competence demanded of attorneys in criminal cases. The two-part standard adopted in *Strickland* v. *Washington*, 466 U. S. 668, for evaluating claims of ineffective assistance of counsel—requiring that the defendant show that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different—applies to guilty plea challenges based on ineffective assistance of counsel. In order to satisfy the second, or "prejudice," requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Pp. 56–60.

(b) In the present case it is unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because petitioner's allegations were insufficient to satisfy the "prejudice" requirement. He did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date,

he would have pleaded not guilty and insisted on going to trial. Nor did he allege any special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether to plead guilty. P. 60.

764 F. 2d 1279, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, in which STEVENS, J., joined, *post*, p. 60.

Jack T. Lassiter, by appointment of the Court, 471 U. S. 1064, argued the cause and filed a brief for petitioner.

John Steven Clark, Attorney General of Arkansas, argued the cause for respondent. With him on the brief was *Alice Ann Burns*, Deputy Attorney General.

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner William Lloyd Hill pleaded guilty in the Arkansas trial court to charges of first-degree murder and theft of property. More than two years later he sought federal habeas relief on the ground that his court-appointed attorney had failed to advise him that, as a second offender, he was required to serve one-half of his sentence before becoming eligible for parole. The United States District Court for the Eastern District of Arkansas denied relief without a hearing, and the en banc Court of Appeals for the Eighth Circuit affirmed by an equally divided court. We granted certiorari because of the difference between the result reached in the present case and that reached by the Court of Appeals for the Fourth Circuit in *Strader* v. *Garrison*, 611 F. 2d 61 (1979). 470 U. S. 1049 (1985). We affirm the judgment of the Court of Appeals for the Eighth Circuit because we conclude that petitioner failed to allege the kind of prejudice from the allegedly incompetent advice of counsel that would have entitled him to a hearing.

Under Arkansas law, the murder charge to which petitioner pleaded guilty carried a potential sentence of 5 to 50

years or life in prison, along with a fine of up to $15,000. Ark. Stat. Ann. §§ 41–1502(3), 41–901(1)(a), 41–1101(1)(a) (1977). Petitioner's court-appointed attorney negotiated a plea agreement pursuant to which the State, in return for petitioner's plea of guilty to both the murder and theft charges, agreed to recommend that the trial judge impose concurrent prison sentences of 35 years for the murder and 10 years for the theft. Petitioner signed a written "plea statement" indicating that he understood the charges against him and the consequences of pleading guilty, that his plea had not been induced "by any force, threat, or promise" apart from the plea agreement itself, that he realized that the trial judge was not bound by the plea agreement and retained the sole "power of sentence," and that he had discussed the plea agreement with his attorney and was satisfied with his attorney's advice. The last two lines of the "plea statement," just above petitioner's signature, read: "I am aware of everything in this document. I fully understand what my rights are, and I voluntarily plead guilty because I am guilty as charged."

Petitioner appeared before the trial judge at the plea hearing, recounted the events that gave rise to the charges against him, affirmed that he had signed and understood the written "plea statement," reiterated that no "threats or promises" had been made to him other than the plea agreement itself, and entered a plea of guilty to both charges. The trial judge accepted the guilty plea and sentenced petitioner in accordance with the State's recommendations. The trial judge also granted petitioner credit for the time he had already served in prison, and told petitioner that "[y]ou will be required to serve at least one-third of your time before you are eligible for parole."

More than two years later petitioner filed a federal habeas corpus petition alleging, *inter alia*, that his guilty plea was involuntary by reason of ineffective assistance of counsel because his attorney had misinformed him as to his parole eligi-

bility date. According to petitioner, his attorney had told him that if he pleaded guilty he would become eligible for parole after serving one-third of his prison sentence. In fact, because petitioner previously had been convicted of a felony in Florida, he was classified under Arkansas law as a "second offender" and was required to serve one-half of his sentence before becoming eligible for parole. Ark. Stat. Ann. §43–2829B(3) (1977). Petitioner asked the United States District Court for the Eastern District of Arkansas to reduce his sentence to a term of years that would result in his becoming eligible for parole in conformance with his original expectations.

The District Court denied habeas relief without a hearing. The court noted that neither Arkansas nor federal law required that petitioner be informed of his parole eligibility date prior to pleading guilty, and concluded that, even if petitioner was misled by his attorney's advice, parole eligibility "is not such a consequence of [petitioner's] guilty plea that such misinformation renders his plea involuntary." The court also held that "even if an attorney's advice concerning such eligibility is not wholly accurate, such advice does not render that attorney's performance constitutionally inadequate."

A divided panel of the Court of Appeals for the Eighth Circuit affirmed, holding that parole eligibility is a collateral rather than a direct consequence of a guilty plea, of which a defendant need not be informed, and that the District Court did not err in declining to hold a hearing on petitioner's claims. 731 F. 2d 568, 570–573 (1984). One judge dissented, arguing that a hearing should have been held to determine whether the attorney's alleged mistake in informing petitioner about "the applicable law" constituted ineffective assistance of counsel and warranted vacating the guilty plea. *Id.*, at 573–574 (Heaney, J., dissenting). On rehearing, the en banc Court of Appeals affirmed the judgment of the Dis-

trict Court by an equally divided court. 764 F. 2d 1279 (1985).

The longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina* v. *Alford*, 400 U. S. 25, 31 (1970); see *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969); *Machibroda* v. *United States*, 368 U. S. 487, 493 (1962). Here petitioner does not contend that his plea was "involuntary" or "unintelligent" simply because the State through its officials failed to supply him with information about his parole eligibility date. We have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary, and indeed such a constitutional requirement would be inconsistent with the current rules of procedure governing the entry of guilty pleas in the federal courts. See Fed. Rule Crim. Proc. 11(c); Advisory Committee's Notes on 1974 Amendment to Fed. Rule Crim. Proc. 11, 18 U. S. C. App., p. 22 (federal courts generally are not required to inform defendant about parole eligibility before accepting guilty plea). Instead, petitioner relies entirely on the claim that his plea was "involuntary" as a result of ineffective assistance of counsel because his attorney supplied him with information about parole eligibility that was erroneous. Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." *McMann* v. *Richardson*, 397 U. S. 759, 771 (1970). As we explained in *Tollett* v. *Henderson*, 411 U. S. 258 (1973), a defendant who pleads guilty upon the advice of counsel "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from coun-

sel was not within the standards set forth in *McMann*." *Id.*, at 267.

Our concern in *McMann* v. *Richardson* with the quality of counsel's performance in advising a defendant whether to plead guilty stemmed from the more general principle that all "defendants facing felony charges are entitled to the effective assistance of competent counsel." 397 U. S., at 771, and n. 14; see *Reece* v. *Georgia*, 350 U. S. 85, 90 (1955); *Powell* v. *Alabama*, 287 U. S. 45 (1932). Two Terms ago, in *Strickland* v. *Washington*, 466 U. S. 668 (1984), we adopted a two-part standard for evaluating claims of ineffective assistance of counsel. There, citing *McMann*, we reiterated that "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." 466 U. S., at 687–688. We also held, however, that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. This additional "prejudice" requirement was based on our conclusion that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.*, at 691.

Although our decision in *Strickland* v. *Washington* dealt with a claim of ineffective assistance of counsel in a capital sentencing proceeding, and was premised in part on the similarity between such a proceeding and the usual criminal trial, the same two-part standard seems to us applicable to ineffective-assistance claims arising out of the plea process. Certainly our justifications for imposing the "prejudice" requirement in *Strickland* v. *Washington* are also relevant in the context of guilty pleas:

> "The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in

> an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense." *Id.*, at 693.

In addition, we believe that requiring a showing of "prejudice" from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas we identified in *United States* v. *Timmreck*, 441 U. S. 780 (1979):

> "'Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.'" *Id.*, at 784 (quoting *United States* v. *Smith*, 440 F. 2d 521, 528–529 (CA7 1971) (Stevens, J., dissenting)).

We hold, therefore, that the two-part *Strickland* v. *Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel. In the context of guilty pleas, the first half of the *Strickland* v. *Washington* test is nothing more than a restatement of the standard of attorney competence already set forth in *Tollett* v. *Henderson*, *supra*, and

McMann v. *Richardson*, *supra*. The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.*

In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. See, *e. g.*, *Evans* v. *Meyer*, 742 F. 2d 371, 375 (CA7 1984) ("It is inconceivable to us . . . that [the defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received"). As we explained in *Strickland* v. *Washington*, *supra*, these predic-

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*Several Courts of Appeals have adopted this general approach. See *Thomas* v. *Lockhart*, 738 F. 2d 304, 307 (CA8 1984); accord, *United States* v. *Gavilan*, 761 F. 2d 226, 228 (CA5 1985); *Beans* v. *Black*, 757 F. 2d 933, 936–937 (CA8 1985); *Mitchell* v. *Scully*, 746 F. 2d 951, 957 (CA2 1984); *Evans* v. *Meyer*, 742 F. 2d 371, 374–375 (CA7 1984).

tions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncrasies of the particular decisionmaker." *Id.*, at 695.

In the present case the claimed error of counsel is erroneous advice as to eligibility for parole under the sentence agreed to in the plea bargain. App. 31. We find it unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland* v. *Washington* requirement of "prejudice." Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial. He alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty. Indeed, petitioner's mistaken belief that he would become eligible for parole after serving one-third of his sentence would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted.

Because petitioner in this case failed to allege the kind of "prejudice" necessary to satisfy the second half of the *Strickland* v. *Washington* test, the District Court did not err in declining to hold a hearing on petitioner's ineffective assistance of counsel claim. The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE WHITE, with whom JUSTICE STEVENS joins, concurring in the judgment.

The only question properly before the Court is whether petitioner is entitled to an evidentiary hearing in a federal habeas proceeding where he has alleged that his guilty plea

entered in state court was involuntary and resulted from ineffective assistance of counsel. I write separately to state why, under the particular facts of this case, petitioner is not entitled to an evidentiary hearing on his habeas claim of ineffective assistance of counsel.

It is necessary, in my view, to focus on the "plea statement" signed by petitioner. The statement is a standardized form to be completed by defense counsel, in consultation with his client, and submitted to the court for consideration. The form calls for the insertion of specific information in the appropriate spaces. Among the items to be included are the crime with which the defendant is charged, whether that crime is a felony or a misdemeanor, and the maximum sentence and/or fine defendant could receive if found guilty of the offense. There is also a blank space in which to indicate the number of prior convictions which the defendant has suffered. App. 28.

As the majority indicates, petitioner signed such a written "plea statement" indicating that he understood the charges against him, the consequences of pleading guilty, and that he was "aware of everything in this document." *Ante*, at 54; App. 28. In the space provided for disclosing the number of prior convictions, petitioner's form reads "0." *Ibid.*

Although it is unclear whether petitioner or his counsel filled out the form and inserted this number, there is no allegation that petitioner told his attorney about his previous Florida felony conviction. Indeed, it is incredible that the attorney would have filled in the "0" had he known there was a prior conviction. Petitioner thus has no factual basis for suggesting that his attorney's advice was incompetent, or that he was affirmatively misled by counsel as to his earliest possible parole eligibility date. Without an allegation that the attorney knew of petitioner's prior conviction, but failed to inform him of the applicability of the Arkansas "second offender" statute, there is no reason to provide petitioner with an evidentiary hearing on his claim of ineffective assistance

of counsel. None of his allegations, if proved, would entitle petitioner to relief, as there is nothing in the record to indicate "that [defense] counsel's representation fell below an objective standard of reasonableness." *Strickland* v. *Washington*, 466 U. S. 668, 687–688 (1984); see also *McMann* v. *Richardson*, 397 U. S. 759, 771 (1970).

Were it not for the misinformation in the plea statement—had petitioner's attorney known of a prior conviction and still informed petitioner that he would be eligible for parole after serving one-third of his sentence—petitioner would be entitled to an evidentiary hearing and an opportunity to prove that counsel's failure to advise of him of the effect of Ark. Stat. Ann. §43–2829B(3) (1977) amounted to ineffective assistance of counsel. The failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis adopted by the majority, as such an omission cannot be said to fall within "the wide range of professionally competent assistance" demanded by the Sixth Amendment. *Strickland* v. *Washington*, *supra*, at 690.

Moreover, an examination of the record reveals that petitioner alleged sufficient facts to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Ante*, at 59. In the first two paragraphs of his habeas petition, petitioner alleged, in pertinent part, as follows:

> "I agreed to plead guilty with the understanding that I'd get 35 yrs. for 1st degree murder & 10 years concurrent for theft of property, and that I would only have 1/3 of my sentence to do, less good time. . . .
>
> "My lawyer told me that a plea negotiation was binding to both sides and that the Court would impose the sentence agreed to by me and the prosecutor. I did not know that the Court could deviate from the concessions agreed to without informing me, nor that it could say to do 1/3 minimum enstead *[sic]* of just 1/3, until parole." App. 8–9.

Later, petitioner made the following objections to the Magistrate's proposed order:

> "Petitioner's first two arguments should be restated to allege that his guilty plea was involuntary in that his counsel improperly advised him as to his earliest possible parole eligibility date and as a result of that incorrect advice the Petitioner did not fully understand the consequences of his plea." *Id.*, at 40.
>
> "The Petitioner contends that his counsel's erroneous advice concerning his potential parole eligibility date was a critical factor in his decision to enter a guilty plea. It was an important consequence of his plea which he did not understand." *Id.*, at 41–42.
>
> "It is Petitioner's contention that he would not have entered the negotiated plea had his attorney correctly advised him that he would be required to serve one-half of his sentence less good time under Arkansas law." *Id.*, at 46–47.

In sum, because petitioner failed to allege that his attorney knew about his prior conviction but failed to inform him of the applicability of Ark. Stat. Ann. § 43–2829B(3) (1977), I find that petitioner did not allege sufficient facts to entitle him to an evidentiary hearing on his ineffective-assistance-of-counsel claim. Had petitioner made such an allegation, however, he would be entitled to such a hearing, as he clearly alleged more than sufficient facts that, if proved, would show that he was prejudiced by his counsel's error, and thus entitled to habeas relief.

GREEN ET AL. *v.* MANSOUR, DIRECTOR, MICHIGAN DEPARTMENT OF SOCIAL SERVICES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-6270. Argued October 7, 1985—Decided December 3, 1985

Petitioner recipients of benefits under the federal Aid to Families With Dependent Children (AFDC) program brought class actions in Federal District Court against respondent Director of the Michigan Department of Social Services. They claimed that respondent's policies of prohibiting the deduction of child care costs and requiring the inclusion of stepparents' income for purposes of calculating earned income, thereby determining eligibility for and the amount of AFDC benefits, violated applicable federal law. Petitioners sought an injunction, a declaratory judgment, and "notice relief." While the actions were pending, Congress amended the relevant federal statute to expressly require States to deduct child care expenses and to include stepparents' income. Granting respondent's motions to dismiss in each case, the District Court held that the changes in federal law rendered moot the claims for prospective relief, that the remaining claims for declaratory and "notice relief" related solely to past violations of federal law, and that such retrospective relief was barred by the Eleventh Amendment. The Court of Appeals affirmed in a consolidated appeal.

Held:

1. Petitioners are not entitled to "notice relief." Since there is no continuing violation of federal law to enjoin, and therefore no valid injunction to which notice could attach, the notice cannot be justified as a mere case-management device that is ancillary to a judgment awarding valid prospective relief. *Quern* v. *Jordan*, 440 U. S. 332, distinguished. Absent these conditions, the Eleventh Amendment limitation on the Art. III power of federal courts prevents them from ordering "notice relief" against States because it is not the type of remedy designed to prevent ongoing violations of supreme federal law. Pp. 68-72.

2. Nor are petitioners entitled to a declaratory judgment that respondent violated federal law in the past. Where there is no claimed continuing violation of federal law or any threat of future violation, a declaratory judgment is inappropriate because its purpose could only be to provide a federal judgment on the issue of liability with the hope that it would be res judicata in state-court proceedings, leaving to the state courts only a form of accounting proceeding whereby damages or restitu-

tion would be computed. This would be an inappropriate exercise of federal judicial power because it would have much the same effect as an award of damages or restitution, which kinds of relief against States are prohibited by the Eleventh Amendment. Pp. 72–73.

742 F. 2d 277, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 74. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 79. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 81.

William Burnham argued the cause for petitioners. With him on the briefs was *Paul D. Reingold.*

Louis J. Caruso, Solicitor General of Michigan, argued the cause for respondent. With him on the brief were *Thomas L. Casey*, *Erica Weiss Marsden*, and *Robert N. Rosenberg*, Assistant Attorneys General.

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners brought two separate class actions in the United States District Court for the Eastern District of Michigan against respondent Director of the Michigan Department of Social Services, claiming that respondent's calculations of benefits under the federal Aid to Families With Dependent Children (AFDC) program violated certain provisions of that federal law. Before a final determination on the merits of either case could be made, Congress amended the relevant statutory provisions. It is undisputed that respondent's calculations thereafter have conformed to federal law. Notwithstanding this fact, petitioners claim that they were entitled to have the District Court award them both "notice relief" and a declaration that respondent's prior conduct violated federal law. The District Court denied petitioners both forms of relief, and the Court of Appeals for the Sixth Circuit affirmed. We now affirm the judgment of the Court of Appeals, holding that the Eleventh Amendment

to the United States Constitution and applicable principles governing the issuance of declaratory judgments forbid the award of either form of relief.

The two class actions involved in this case were brought on behalf of recipients of benefits disbursed under the AFDC program. See 42 U. S. C. §§ 601–615. The AFDC program uses a person's earned income in determining eligibility for, and the amount of, benefits. See § 602. The complaints alleged that certain of respondent's policies and regulations violated 42 U. S. C. § 1983 by inflating their respective class members' earned income and thereby causing a reduction or termination of AFDC benefits contrary to the applicable federal law.

One putative class challenged respondent's policy of prohibiting the deduction of child care costs in the calculation of earned income. While the case was pending in the District Court, Congress changed the relevant provisions of the AFDC program to expressly require participating States to deduct child care expenses up to a specified amount. Respondent thereafter brought state policy into compliance with this amendment and began deducting child care expenses in the calculation of earned income. There is no claim that respondent's current child care deduction policy violates federal law.

The other putative class challenged respondent's policy of automatically including stepparents' income in the calculation of earned income. The District Court issued a preliminary injunction preventing respondent from enforcing its automatic inclusion policy. But again, while the matter was pending on the merits, Congress amended the relevant section of the AFDC program to expressly require States to include stepparent income in the calculation of earned income. The parties thereafter stipulated that the District Court should terminate its preliminary injunction as of the effective date of the amendment. Here, too, there is no claim that respondent has not complied with federal law since that time.

The District Court granted respondent's motions to dismiss in each case. It held in each that the changes in federal law rendered moot the claims for prospective relief, and that the remaining claims for declaratory and notice relief related solely to past violations of federal law. Such retrospective relief, the court determined, is barred by the Eleventh Amendment.

The Court of Appeals affirmed in a consolidated appeal. *Banas* v. *Dempsey*, 742 F. 2d 277 (1984). It agreed that the changes in federal law rendered moot the claims for prospective relief. *Id.*, at 281–283. It also agreed that because the sought-after notice and declaratory relief was retrospective in nature, the relief was barred by *Edelman* v. *Jordan*, 415 U. S. 651 (1974). 742 F. 2d, at 286–288. It reasoned that when there is no prospective relief to which notice can be ancillary, even notice of the sort approved in *Quern* v. *Jordan*, 440 U. S. 332 (1979), cannot escape the Eleventh Amendment bar. 742 F. 2d, at 287–288. Declaratory relief is similarly barred under such circumstances, it explained, because such relief could relate solely to past violations of federal law. *Id.*, at 288.

We granted certiorari to resolve a conflict in the Circuits over whether federal courts may order the giving of notice of the sort approved in *Quern* v. *Jordan*, *supra*, or issue a declaratory judgment that state officials violated federal law in the past when there is no ongoing violation of federal law. The decision by the Court of Appeals in this case agrees with the result in *Colbeth* v. *Wilson*, 554 F. Supp. 539 (Vt. 1982), aff'd, 707 F. 2d 57 (CA2 1983) *(per curiam)*, but it conflicts with the decisions in *Appleyard* v. *Wallace*, 754 F. 2d 955, 959–963 (CA11 1985); *Randall* v. *Lukhard*, 729 F. 2d 966 (CA4) (en banc), cert. denied, 469 U. S. 872 (1984); *Beltran* v. *Myers*, 701 F. 2d 91, 94 (CA9) *(per curiam)*, cert. denied, 462 U. S. 1134 (1983); and *Silva* v. *Vowell*, 621 F. 2d 640, 650–654 (CA5 1980), which all allowed notice relief even though changes in state policy or federal law rendered moot

any claim for injunctive relief stopping ongoing violations of federal law. We now affirm the decision of the Court of Appeals.

The Eleventh Amendment confirms that "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." *Pennhurst State School & Hospital* v. *Halderman*, 465 U. S. 89, 98 (1984). Because of the Eleventh Amendment, States may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity. *Id.*, at 99. The landmark case of *Ex parte Young*, 209 U. S. 123 (1908), created an exception to this general principle by asserting that a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State. *Id.*, at 159–160. The theory of *Young* was that an unconstitutional statute is void, *id.*, at 159, and therefore does not "impart to [the official] any immunity from responsibility to the supreme authority of the United States." *Id.*, at 160. *Young* also held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law. *Id.*, at 155–156, 159. We have refused to extend the reasoning of *Young*, however, to claims for retrospective relief. See *Pennhurst*, *supra*, at 102–103; *Quern* v. *Jordan*, *supra*, at 337; *Edelman* v. *Jordan*, *supra*, at 668.

Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. See *Pennhurst*, *supra*, at 102. See also *Milliken* v. *Bradley*, 433 U. S. 267 (1977). But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment. Petitioners concede that any claim they might

have had for the specific type of injunctive relief approved in *Ex parte Young* was rendered moot by the amendments to the AFDC program. They nevertheless seek "notice relief" of the type approved in *Quern* v. *Jordan*, arguing that notice is an independent form of prospective relief protected against the Eleventh Amendment bar by *Ex parte Young*. In taking this position, we think petitioners misconceive our Eleventh Amendment jurisprudence and our decision in *Quern*.

Quern was the last chapter in the litigation that initially gave rise to *Edelman* v. *Jordan*, *supra*. The plaintiffs in that litigation challenged a State's administration of the federal-state program for Aid to the Aged, Blind, or Disabled (AABD). The District Court issued a declaratory judgment that current state regulations governing the administration of the program violated federal regulations then in effect.[1] It therefore permanently enjoined the state officials from continuing to violate federal law. Although the language of the declaratory judgment was no broader than necessary to complement the injunction against the current violation of federal law, it implied that the defendants had violated federal law in the past. The District Court therefore issued a second injunction ordering the defendants to release and remit all AABD benefits that they had wrongfully withheld on account of their past violations of federal law. The Court of Appeals affirmed, *Jordan* v. *Weaver*, 472 F. 2d 985 (CA7 1973), but we reversed, holding that the Eleventh Amendment barred the injunction ordering retroactive benefits because it was effectively an award of money damages for past

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[1] The declaratory judgment was embodied in paragraph 4 of the District Court's judgment, which stated:

"Illinois Categorical Assistance Manual, Section 4004, and subsections thereunder, as applied to applicants for AABD are invalid insofar as they *are* inconsistent with the requirements of [federal law as construed in] paragraphs 1 and 2." *Jordan* v. *Weaver*, No. 71 C 70, p. 3 (ND Ill., Mar. 15, 1972) (emphasis added).

violations of federal law. *Edelman* v. *Jordan*, 451 U. S., at 666–669.

On remand, the District Court ordered the defendants to send notice to the plaintiff class informing individual class members that they were wrongfully denied benefits in a particular amount, together with a returnable form for filing claims with the appropriate state agency. The Court of Appeals reversed, holding that the District Court's proposed notice violated the Eleventh Amendment because it would effectively result in a federal adjudication of state liability for past violations of federal law. *Jordan* v. *Trainor*, 563 F. 2d 873, 875 (CA7 1977) (en banc). At the same time, the Court of Appeals determined that the Eleventh Amendment would not bar an order requiring state officials to send "a mere explanatory notice to applicants advising them that there is a state administrative procedure available if they desire to have the state determine whether or not they may be eligible for past benefits." *Ibid.*

We affirmed in *Quern* v. *Jordan*, 440 U. S. 332 (1979), holding that although *Edelman* v. *Jordan*, *supra*, retained continuing vitality after *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), see 440 U. S., at 338–345, the specific notice order approved by the Court of Appeals did not violate the Eleventh Amendment. *Id.*, at 346–349. We explained that the appellate court's particular notice order fell "on the *Ex parte Young* side of the Eleventh Amendment line rather than on the *Edelman* side." *Id.*, at 347. We reasoned that "unlike [the notice] ordered by the District Court, [this notice was] more properly viewed as ancillary to the prospective relief already ordered by the court," *id.*, at 349, and it did no more than "simply infor[m] class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures which they may wish to pursue." *Ibid.* We also stressed that the state defendants had not objected to the expense of providing

such notice, state agencies rather than federal courts would be the final arbiters of whether retroactive payments would be ordered, and the notice would not automatically lead to any particular action. *Id.*, at 347–348.

Our review of the long, drawn-out *Jordan* litigation convinces us that neither the Court of Appeals nor this Court conceived of the requested notice allowed in that case to be an independent form of relief. We simply held that the specific order fell within the *Ex parte Young* exception to the Eleventh Amendment principle of sovereign immunity because it was ancillary to a valid injunction previously granted and was sufficiently narrow to retain its character as a mere case-management device. The notice in *Quern* v. *Jordan* did nothing other than inform a diverse and partially victorious class concerning the extent of the judgment in its favor, cf. Fed. Rule Civ. Proc. 23(d)(2), and that the federal courts could do no more for them. There was no suggestion that the notice itself would bind state officials in any way, or that such notice would be routinely available as a form of relief in other cases. Because "notice relief" is not the type of remedy designed to prevent ongoing violations of federal law, the Eleventh Amendment limitation on the Art. III power of federal courts prevents them from ordering it as an independent form of relief.

Measured by the standards of *Quern*, however, a request for a limited notice order will escape the Eleventh Amendment bar if the notice is ancillary to the grant of some other appropriate relief that can be "noticed." Because there is no continuing violation of federal law to enjoin in this case, an injunction is not available. Therefore, notice cannot be justified as a mere case-management device that is ancillary to a judgment awarding valid prospective relief. Petitioners argue, however, that they are entitled to a declaratory judgment that respondent violated federal law in the past. Only if petitioners are correct in this assertion can they properly

claim a right to "notice" of a judgment under the principles of *Quern*.

The Declaratory Judgment Act of 1934, 28 U. S. C. § 2201, permits a federal court to declare the rights of a party whether or not further relief is or could be sought, and we have held that under this Act declaratory relief may be available even though an injunction is not. *Steffel* v. *Thompson*, 415 U. S. 452, 462 (1974). But we have also held that the declaratory judgment statute "is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Public Service Comm'n* v. *Wycoff Co.*, 344 U. S. 237, 241 (1952). The propriety of issuing a declaratory judgment may depend upon equitable considerations, see *Samuels* v. *Mackell*, 401 U. S. 66, 73 (1971), and is also "informed by the teachings and experience concerning the functions and extent of federal judicial power." *Wycoff*, *supra*, at 243; cf. *Younger* v. *Harris*, 401 U. S. 37, 44–45 (1971).

In applying these principles, we have held that a declaratory judgment is not available in a number of instances. In *Great Lakes Co.* v. *Huffman*, 319 U. S. 293 (1943), we held that a declaratory judgment was not available to obtain a determination of the constitutionality of a state tax even though the relevant federal statute prohibited federal courts only from issuing injunctions against the collection of such taxes. *Id.*, at 299. We held in *Samuels* v. *Mackell*, *supra*, that a declaratory judgment declaring a state criminal statute unconstitutional was unavailable where it would have much the same effect as an injunction prohibiting enforcement of the statute, and the latter was barred by traditional principles of equity, comity, and federalism. *Id.*, at 69–73. In *Wycoff*, we held that it was inappropriate to issue a declaratory judgment deciding whether the plaintiff's business was interstate commerce and therefore potentially immune from state regulation. 344 U. S., at 244, 247–249. We reasoned that if the federal judgment were res judicata in subsequent

state proceedings, then the federal court will have lifted the case out of the state court before the state agency or court can hear it. *Id.*, at 247. On the other hand, if the federal judgment would not have such an effect, then it would "serv[e] no useful purpose as a final determination of rights." *Ibid.*

We think that these cases demonstrate the impropriety of the issuance of a declaratory judgment in this case. There is no claimed continuing violation of federal law, and therefore no occasion to issue an injunction. Nor can there be any threat of state officials violating the repealed law in the future. Cf. *Steffel* v. *Thompson*, *supra*, at 454. There is a dispute about the lawfulness of respondent's past actions, but the Eleventh Amendment would prohibit the award of money damages or restitution if that dispute were resolved in favor of petitioners. We think that the award of a declaratory judgment in this situation would be useful in resolving the dispute over the past lawfulness of respondent's action only if it might be offered in state-court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed. But the issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment. The teachings of *Huffman*, *Samuels*, and *Wycoff* are that a declaratory judgment is not available when the result would be a partial "end run" around our decision in *Edelman* v. *Jordan*, 415 U. S. 651 (1974).[2]

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[2] If, of course, petitioners would make no claim that the federal declaratory judgment was res judicata in later commenced state proceedings, the declaratory judgment would serve no purpose whatever in resolving the remaining dispute between the parties, and is unavailable for that reason. *Wycoff*, 344 U. S., at 247.

JUSTICE BRENNAN's dissent contends that because the injunction and declaratory judgment in *Quern* implied past violations of federal law, declaratory judgments expressly adjudicating the question of past violations are routinely available. We think he is mistaken. The District Court's injunction and declaratory judgment against continuing and future violations of federal law in *Quern* implied that similar violations had occurred in the past because neither state nor federal policy had varied through the time of judgment. Here, by contrast, there are no present violations under the amended statute, and even if there were, an injunction against them would not imply that past practice violated the repealed federal law. Thus, a declaratory judgment that respondent violated federal law in the past would have to stand on its own feet as an appropriate exercise of federal jurisdiction in this case. This it cannot do for the reasons we have previously stated.

We hold that the District Court was correct in concluding that neither the "notice" proposed by petitioners nor a declaratory judgment should have issued in a case of this type. The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

Last Term, in my dissent in *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 257 (1985), I explained at length my view that the Court's Eleventh Amendment doctrine "lacks a textual anchor [in the Constitution], a firm historical foundation, or a clear rationale." Today's decision demonstrates that the absence of a stable analytical structure underlying the Court's Eleventh Amendment jurisprudence produces inconsistent decisions.

In *Quern* v. *Jordan*, 440 U. S. 332 (1979), the State of Illinois contended that the notice relief ordered by the Court of Appeals, which was identical in all significant respects to

that requested in the instant case,[1] offended the Eleventh Amendment because "giving the proposed notice [would] lead inexorably to the payment of state funds for retroactive benefits and therefore it, in effect, amounts to a monetary award." *Id.*, at 347. JUSTICE REHNQUIST, writing for the Court, rejected that argument:

> "[T]he chain of causation which petitioner seeks to establish is by no means unbroken; it contains numerous missing links, which can be supplied, if at all, only by the State and members of the plaintiff class and not by a federal court. The notice approved by the Court of Appeals simply apprises plaintiff class members of the existence of whatever administrative procedures may already be available under state law by which they may receive a determination of eligibility for past benefits. . . . The mere sending of that notice does not trigger the state administrative machinery. Whether a recipient of notice decides to take advantage of those available state procedures is left completely to the discretion of that particular class member; the federal court plays no role in that decision. And whether or not the class member will receive retroactive benefits rests entirely with the

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[1] Green asked the District Court to order that notices be sent out to other AFDC recipients advising them of the outcome of the litigation, *i. e.*, of the declaratory judgment and telling them that state administrative proceedings might be available to them to obtain retroactive benefits. App. 132. Similarly, the notice approved in *Quern* v. *Jordan*, 440 U. S., at 349, "inform[ed] class members that their federal suit [was] at an end, that the federal court [could] provide them with no further relief, and that there [were] existing state administrative procedures which they may wish to pursue." The class members were "'given no more . . . than what they would have gathered by sitting in the courtroom.'" *Ibid.*, quoting *Jordan* v. *Trainor*, 563 F. 2d 873, 877–878 (CA7 1977). And, of course, what class members would have gathered by sitting in the courtroom was the substantive outcome of the litigation—a declaration that Illinois officials had violated federal law.

> State, its agencies, courts, and legislature, not with the federal court." *Id.*, at 347–348.

In the present case, the Court turns around and accepts the argument made by the State of Illinois in *Quern* with respect to Green's request for declaratory relief. JUSTICE REHNQUIST states that declaratory relief is barred by the Eleventh Amendment because

> "the award of a declaratory judgment in this situation would be useful in resolving the dispute over the past lawfulness of respondent's action only if it might be offered in state-court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed. But the issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being . . . prohibited by the Eleventh Amendment." *Ante*, at 73.

What the Court ignores is that the declaration by the District Court in the *Quern* litigation that Illinois officials had violated federal law, combined with the notice relief we sanctioned, would have yielded the same result.[2] The Court fails to explain adequately why declaratory relief should be analyzed differently than notice relief was in *Quern*, since use of the declaratory judgment in the State's courts is also left completely to the discretion of individual notice recipients and the award of retroactive benefits "rests entirely with the State, its agencies, courts, and legislature, not with the federal court." *Quern*, *supra*, at 348.

[2] It is not enough to distinguish the cases to observe that the notice relief in *Quern* was "ancillary" to a prospective injunction because the "prospective" injunction had been moot for three years before the Court of Appeals fashioned the notice relief and for five years before this Court approved it—Congress abolished the federal program at issue in *Quern* in 1974.

By way of explication, the Court retreats to the position that federal courts may grant relief prospectively, that is, against ongoing and future violations of federal law, but not retroactively, that is, against past violations of federal law. Basically what the Court is doing, as it admits in this case, is balancing the Eleventh Amendment and the Supremacy Clause. *Ante*, at 68. If relief is sought against continuing violations, the Court finds that the Supremacy Clause outweighs the Eleventh Amendment; but if relief is requested against past violations, the Court determines that the Eleventh Amendment outweighs the Supremacy Clause. The Court cites no constitutional authority for this balancing test and has not offered, and I suspect cannot offer, a satisfactory analytical foundation for it.

Furthermore, I strenuously disagree with the Court's suggestion that the balance it has struck sufficiently protects the supremacy of federal law. It may be true that the availability of prospective relief of the sort awarded in *Ex parte Young*, 209 U. S. 123 (1908), gives, as the Court puts it, some "life" to the Supremacy Clause. *Ante*, at 68. That this rule saves the Clause from being completely moribund does not, however, alter the reality that it is insufficient to ensure that federal law is paramount. From this day forward, at least with regard to welfare programs, States may refuse to follow federal law with impunity, secure in the knowledge that all they need do to immunize themselves from accountability in federal courts is to conform their policies to federal law on the eve of judgment in a suit brought to secure "prospective" injunctive relief. During the period of noncompliance, States save money by not paying benefits according to the criteria established by federal law,[3] while needy individuals desig-

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[3] AFDC is a matching benefits program. States pay up to 50 percent of their benefit payments, the Federal Government pays the remainder. House Committee on Ways and Means, Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means, 98th Cong., 2d Sess., 292 (Comm. Print 1984).

nated by Congress as the beneficiaries of welfare programs are cheated of their federal rights. Once again, the Court's doctrine "require[s] the federal courts to protect States that violate federal law from the legal consequences of their conduct." *Atascadero*, 473 U. S., at 258. Surely the Supremacy Clause requires a different result.

The foregoing reveals the fundamental incoherence of the Court's Eleventh Amendment jurisprudence. Before the Court can develop a coherent Eleventh Amendment doctrine, I believe that it must reassess a long line of our precedents, beginning with *Hans* v. *Louisiana*, 134 U. S. 1 (1890), and culminating in today's decision, that have perpetuated an erroneous interpretation of the Eleventh Amendment. As I demonstrated in *Atascadero*, *supra*, the Court's constitutional doctrine of the sovereign immunity of States rests on a mistaken historical premise. Because I treated the subject exhaustively in that case, I will only restate my conclusions here. Recent scholarship indicates that the Framers never intended to constitutionalize the doctrine of state sovereign immunity; consequently the Eleventh Amendment was not an effort to reestablish, after *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), a limitation on federal judicial power contained in Article III. Nor, given the limited terms and context in which the Eleventh Amendment was drafted, could the Amendment's narrow and technical language be understood to have instituted a broad new limitation on the federal judicial power in cases "arising under" federal law whenever an individual attempts to sue a State. *Atascadero*, 473 U. S., at 258–259. Rather, as the historical records and the language of the Constitution reveal, the Amendment was intended simply to remove federal-court jurisdiction over suits against a State where the basis for jurisdiction was that the plaintiff was a citizen of another State or an alien—suits which result in the abrogation of the *state* law of sovereign immunity in *state-law* causes of action. *Id.*, at 259–280.

Because the disputes in the instant case are between citizens and their own State and because a federal question is the source of federal-court jurisdiction, the Eleventh Amendment, properly construed, is no bar to petitioners' suits.

I respectfully dissent.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

I concur in JUSTICE BRENNAN's and JUSTICE BLACKMUN's dissents. I contribute to this proliferation of opinions only to add a few words as to why, even under the view of the Eleventh Amendment accepted by the majority in *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234 (1985), the majority reaches an incorrect result in this case.

I

JUSTICE BRENNAN's opinion cogently explains how the decision of the majority today repudiates *Quern* v. *Jordan*, 440 U. S. 332 (1979). The Court in that case did not approve notice relief as a "mere case-management device," *ante*, at 71, nor does the majority suggest how informing class members of state administrative procedures serves a case-management function in federal-court litigation. Rather, the *Quern* Court, explicitly posing the question whether "the modified notice contemplated by the Seventh Circuit constitute[s] permissible prospective relief or a 'retroactive award which requires the payment of funds from the state treasury,'" concluded that "this relief falls on the *Ex parte Young* side of the Eleventh Amendment line rather than on the *Edelman* side." *Quern*, *supra*, at 346–347.

II

In abandoning the result it reached six years ago, the majority misapplies its own Eleventh Amendment jurisprudence. The majority states that there are two kinds of remedies that can be sought against a state officer: prospective relief "designed to end a continuing violation of federal law,"

and retrospective relief serving mere "compensatory or deterrence interests." *Ante*, at 68. Only in the former class of relief, it concludes, do the federal interests involved outweigh the Eleventh Amendment interests implicated by a suit against a state officer in his official capacity.* "Prospective" and "retrospective" labels, however, should be irrelevant to analysis of this case. The notice relief at issue here imposes no significant costs on the State, creates no direct liabilities against the State, and respects the institutions of state government. See *Quern*, *supra*, at 347–348. This Court has never held that the Eleventh Amendment poses any bar to such relief. Indeed, notice of the availability of possible relief through existing state administrative remedies, where the state agency and state courts would be the sole arbiters of what relief would be granted, assists in the vindication of state law by informing class members that they may have causes of action under that law. In the Eleventh Amendment balance set up by the majority opinion, it is thus hard to see what weight, if any, exists on the State's side of the scale, and why that weight should overcome the interest in vindicating federal law.

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*The distinction is hardly so neat as the majority implies. The majority cites *Milliken* v. *Bradley*, 433 U. S. 267 (1977), as exemplifying permissible injunctive relief. *Ante*, at 68. That case involved a continuing federal duty to remedy the effects of past *de jure* segregation; the Court upheld against Eleventh Amendment attack an order that state officials pay costs attributable to a program "designed . . . to restore the schoolchildren of Detroit to the position they would have enjoyed absent constitutional violations by state and local officials," 433 U. S., at 281, characterizing the relief both as "prospectiv[e]" and as "compensatory," *id.*, at 290. Yet petitioners here note that Congress has imposed on state agencies a continuing federal duty to "take all necessary steps to correct any . . . underpayment of aid under the State plan." 42 U. S. C. § 602(a)(22); see also 45 CFR § 205.10(a) (1984). The relief in this case too might therefore be described as related to a continuing federal duty, "part of a plan that operates *prospectively* to bring about the delayed benefits of a [constitutionally administered program]." *Milliken*, *supra*, at 290 (emphasis in original).

I would hold that whether the Eleventh Amendment was intended simply to provide that a State cannot be sued in federal court where the basis of jurisdiction is that the plaintiff is a citizen of another State or an alien (as I believe), or was intended to constitutionalize a much broader principle of state sovereign immunity (as the majority believes), there is simply nothing offensive to that Amendment in an order that the State notify class members of the possibility that they may be entitled to relief through the state administrative process. Because that order neither imposes significant costs on the State nor creates any direct liabilities against it, the *Quern* Court properly placed it "on the *Ex parte Young* side of the Eleventh Amendment line." 440 U. S., at 347.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

I joined JUSTICE BRENNAN's dissent in *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 247 (1985), and I join his dissent in this case. I fully agree that the Court's Eleventh Amendment approach, as demonstrated by the difference between the result in this case and that in *Quern* v. *Jordan*, 440 U. S. 332 (1979), is sterile, produces inconsistent decisions, and is in serious need of reconsideration. Cf. *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 539, 546–547 (1985).

But I also would reverse the judgment of the Court of Appeals in this case for the additional reason expressed in my dissent (joined by JUSTICES BRENNAN, MARSHALL, and STEVENS) in *Atascadero*, 473 U. S., at 302, namely, the waiver by Michigan, "as a willing recipient of federal funds," *id.*, at 304, of any Eleventh Amendment barrier that otherwise might exist. The State too easily avoids its responsibilities, and the Court by its decision today allows the State to go its way unimpeded and unburdened with any remedy for those who have been wronged during the period of Michigan's noncompliance with federal law.

HEATH *v.* ALABAMA

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 84–5555. Argued October 9, 1985—Decided December 3, 1985

Petitioner hired two men to kill his wife. In accordance with petitioner's plan, the men kidnaped petitioner's wife from her home in Alabama. Her body was later found on the side of a road in Georgia. Petitioner pleaded guilty to "malice" murder in a Georgia trial court in exchange for a sentence of life imprisonment. Subsequently, he was tried and convicted of murder during a kidnaping and was sentenced to death in an Alabama trial court, which rejected his claim of double jeopardy. The Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed the conviction.

Held:

1. This Court will not decide whether the Alabama trial court had jurisdiction, where petitioner did not claim lack of jurisdiction in his petition to the Alabama Supreme Court but raised the claim for the first time in his petition to this Court. P. 87.

2. Under the dual sovereignty doctrine, successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause of the Fifth Amendment, and, hence, Alabama was not barred from trying petitioner. Pp. 87–93.

(a) The dual sovereignty doctrine provides that when a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct "offences" for double jeopardy purposes. In applying the doctrine, the crucial determination is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns. This determination turns on whether the prosecuting entities' powers to undertake criminal prosecutions derive from separate and independent sources. It has been uniformly held that the States are separate sovereigns with respect to the Federal Government because each State's power to prosecute derives from its inherent sovereignty, preserved to it by the Tenth Amendment, and not from the Federal Government. Given the distinct sources of their powers to try a defendant, the States are no less sovereign with respect to each other than they are with respect to the Federal Government. Pp. 87–91.

(b) The application of the dual sovereignty principle cannot be restricted to cases in which two prosecuting sovereigns can demonstrate that allowing only one sovereign to exercise jurisdiction over the defend-

ant will interfere with the second sovereign's unvindicated "interests." If the prosecuting entities are separate sovereigns, the circumstances of the case and the specific "interests" of each are irrelevant. Pp. 91–92.

(c) The suggestion that the dual sovereignty doctrine be overruled and replaced with a balancing of interests approach is rejected. The Court's rationale for the doctrine is not a fiction that can be disregarded in difficult cases; it finds weighty support in the historical understanding and political realities of the States' role in the federal system and in the Double Jeopardy Clause itself. Pp. 92–93.

455 So. 2d 905, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 94. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 95.

Ronald J. Allen argued the cause and filed briefs for petitioner.

William D. Little, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief was *Charles A. Graddick*, Attorney General.

JUSTICE O'CONNOR delivered the opinion of the Court.

The question before the Court is whether the Double Jeopardy Clause of the Fifth Amendment bars Alabama from trying petitioner for the capital offense of murder during a kidnaping after Georgia has convicted him of murder based on the same homicide. In particular, this case presents the issue of the applicability of the dual sovereignty doctrine to successive prosecutions by two States.

I

In August 1981, petitioner, Larry Gene Heath, hired Charles Owens and Gregory Lumpkin to kill his wife, Rebecca Heath, who was then nine months pregnant, for a sum of $2,000. On the morning of August 31, 1981, petitioner left the Heath residence in Russell County, Alabama, to meet with Owens and Lumpkin in Georgia, just over the Alabama

border from the Heath home. Petitioner led them back to the Heath residence, gave them the keys to the Heaths' car and house, and left the premises in his girlfriend's truck. Owens and Lumpkin then kidnaped Rebecca Heath from her home. The Heath car, with Rebecca Heath's body inside, was later found on the side of a road in Troup County, Georgia. The cause of death was a gunshot wound in the head. The estimated time of death and the distance from the Heath residence to the spot where Rebecca Heath's body was found are consistent with the theory that the murder took place in Georgia, and respondent does not contend otherwise.

Georgia and Alabama authorities pursued dual investigations in which they cooperated to some extent. On September 4, 1981, petitioner was arrested by Georgia authorities. Petitioner waived his *Miranda* rights and gave a full confession admitting that he had arranged his wife's kidnaping and murder. In November 1981, the grand jury of Troup County, Georgia, indicted petitioner for the offense of "malice" murder under Ga. Code Ann. § 16–5–1 (1984).[1] Georgia then served petitioner with notice of its intention to seek the death penalty, citing as the aggravating circumstance the fact that the murder was "caused and directed" by petitioner. Record 742. See Ga. Code Ann. § 17–10–30(b)(6) (1982). On February 10, 1982, petitioner pleaded guilty to the Georgia murder charge in exchange for a sentence of life imprisonment, which he understood could involve his serving as few as seven years in prison. See Record 495.

On May 5, 1982, the grand jury of Russell County, Alabama, returned an indictment against petitioner for the capi-

[1] The indictment read as follows:

"[The grand jurors] in the name and on behalf of the citizens of Georgia, charge and accuse LARRY GENE HEATH [et al.] with the offense of MURDER (26–1101); for that the said LARRY GENE HEATH [et al.] on the date of August 31, 1981, in the county aforesaid, did then and there unlawfully and with malice aforethought cause the death of Rebecca McGuire Heath, a human being, by shooting her with a gun, a deadly weapon." Record 740.

tal offense of murder during a kidnaping.[2] See Ala. Code § 13A–5–40(a)(1) (1982). Before trial on this indictment, petitioner entered pleas of *autrefois convict* and former jeopardy under the Alabama and United States Constitutions, arguing that his conviction and sentence in Georgia barred his prosecution in Alabama for the same conduct. Petitioner also entered a plea contesting the jurisdiction of the Alabama court on the ground that the crime had occurred in Georgia.

After a hearing, the trial court rejected petitioner's double jeopardy claims. It assumed, *arguendo*, that the two prosecutions could not have been brought in succession by one State but held that double jeopardy did not bar successive prosecutions by two different States for the same act. See Record 776. The court postponed a ruling on petitioner's plea to jurisdiction until the close of the State's case in chief. See *id.*, at 778.

At the close of the State's case, petitioner argued that Alabama did not have jurisdiction under state law because there had been no evidence of kidnaping and all the evidence showed that Rebecca Heath was killed in Georgia. The State responded that a kidnaping had been proved, and that under Ala. Code § 15–2–3 (1982), if a crime commences in Alabama it may be punished in Alabama regardless of where the crime is consummated. The court rejected both petitioner's jurisdictional plea and his renewed double jeopardy claims. See Record 590.

On January 12, 1983, the Alabama jury convicted petitioner of murder during a kidnaping in the first degree. After a sentencing hearing, the jury recommended the death

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[2] The indictment stated:

"Larry Gene Heath did intentionally cause the death of Rebecca Heath, by shooting her with a gun, and Larry Gene Heath caused said death during Larry Gene Heath's abduction of, or attempt to abduct, Rebecca Heath with intent to inflict physical injury upon her, in violation of § 13A–5–40(a)(1) of the Code of Alabama 1975, as amended, against the peace and dignity of the State of Alabama." *Id.*, at 728.

penalty. Pursuant to Alabama law, a second sentencing hearing was held before the trial judge. The judge accepted the jury's recommendation, finding that the sole aggravating factor, that the capital offense was "committed while the defendant was engaged in the commission of a kidnapping," outweighed the sole mitigating factor, that the "defendant was convicted of the murder of Rebecca Heath in the Superior Court of Troup County, Georgia, . . . and received a sentence of life imprisonment in that court." *Id.*, at 718–720. See Ala. Code §§ 13A–5–49(4), 13A–5–50 (1982).

On appeal, the Alabama Court of Criminal Appeals rejected petitioner's pleas of *autrefois convict* and former jeopardy under the Alabama and United States Constitutions and affirmed his conviction. 455 So. 2d 898 (1983). Petitioner then filed a petition for writ of certiorari with the Alabama Supreme Court, stating the sole issue to be "whether or not the prosecution in the State of Alabama constituted double jeopardy in violation of the 5th Amendment of the United States Constitution." App. 92. The court granted his petition, and unanimously affirmed his conviction. *Ex parte Heath*, 455 So. 2d 905 (1984).

The Alabama Supreme Court noted that "[p]rosecutions under the laws of separate sovereigns do not improperly subject an accused twice to prosecutions for the same offense," citing this Court's cases applying the dual sovereignty doctrine. *Id.*, at 906. The court acknowledged that this Court has not considered the applicability of the dual sovereignty doctrine to successive prosecutions by different States. It reasoned, however, that "[i]f, for double jeopardy purposes, Alabama is considered to be a sovereign entity vis-à-vis the federal government then surely it is a sovereign entity vis-à-vis the State of Georgia." *Ibid.*

Petitioner sought a writ of certiorari from this Court, raising double jeopardy claims and claims based on Alabama's exercise of jurisdiction. No due process objections were asserted. We granted certiorari limited to the question

whether petitioner's Alabama conviction was barred by this Court's decision in *Brown* v. *Ohio*, 432 U. S. 161 (1977), and requested the parties to address the question of the applicability of the dual sovereignty doctrine to successive prosecutions by two States. 470 U. S. 1026 (1985). For the reasons explained below, we affirm the judgment of the Alabama Supreme Court.

Despite the fact that this Court did not grant certiorari on the constitutional objection to Alabama's exercise of jurisdiction, petitioner has continued to argue in this Court his jurisdictional claim. See Tr. of Oral Arg. 11–22, 29–31; Brief for Petitioner 15. We decline to decide the issue because petitioner did not claim lack of jurisdiction in his petition to the Alabama Supreme Court and he raised the claim for the first time in his petition to this Court. Pet. for Cert. 4. Even if we were not jurisdictionally barred from considering claims not pressed or passed upon in the state court, as has sometimes been stated, see, *e. g.*, *State Farm Mutual Automobile Ins. Co.* v. *Duel*, 324 U. S. 154, 160 (1945); *Crowell* v. *Randell*, 10 Pet. 368, 392 (1836), the longstanding rule that this Court will not consider such claims creates, at the least, a weighty presumption against review. See, *e. g.*, *Illinois* v. *Gates*, 462 U. S. 213, 218–222 (1983).

II

Successive prosecutions are barred by the Fifth Amendment only if the two offenses for which the defendant is prosecuted are the "same" for double jeopardy purposes. Respondent does not contravene petitioner's contention that the offenses of "murder during a kidnaping" and "malice murder," as construed by the courts of Alabama and Georgia respectively, may be considered greater and lesser offenses and, thus, the "same" offense under *Brown* v. *Ohio*, *supra*, absent operation of the dual sovereignty principle. See *id.*, at 169; *Illinois* v. *Vitale*, 447 U. S. 410 (1980). We therefore assume, *arguendo*, that, had these offenses arisen under

the laws of one State and had petitioner been separately prosecuted for both offenses in that State, the second conviction would have been barred by the Double Jeopardy Clause.

The sole remaining question upon which we granted certiorari is whether the dual sovereignty doctrine permits successive prosecutions under the laws of different States which otherwise would be held to "subject [the defendant] for the same offence to be twice put in jeopardy." U. S. Const., Amdt. 5. Although we have not previously so held, we believe the answer to this query is inescapable. The dual sovereignty doctrine, as originally articulated and consistently applied by this Court, compels the conclusion that successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause.

The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct "offences." *United States* v. *Lanza*, 260 U. S. 377, 382 (1922). As the Court explained in *Moore* v. *Illinois*, 14 How. 13, 19 (1852), "[a]n offence, in its legal signification, means the transgression of a law." Consequently, when the same act transgresses the laws of two sovereigns, "it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable." *Id.*, at 20.

In applying the dual sovereignty doctrine, then, the crucial determination is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns. This determination turns on whether the two entities draw their authority to punish the offender from distinct sources of power. See, *e. g.*, *United States* v. *Wheeler*, 435 U. S. 313, 320 (1978); *Waller* v. *Florida*, 397 U. S. 387, 393 (1970); *Puerto Rico* v.

Shell Co., 302 U. S. 253, 264–265 (1937); *Lanza*, *supra*, at 382; *Grafton* v. *United States*, 206 U. S. 333, 354–355 (1907). Thus, the Court has uniformly held that the States are separate sovereigns with respect to the Federal Government because each State's power to prosecute is derived from its own "inherent sovereignty," not from the Federal Government. *Wheeler*, *supra*, at 320, n. 14. See *Abbate* v. *United States*, 359 U. S. 187, 193–194 (1959) (collecting cases); *Lanza*, *supra*. As stated in *Lanza*, *supra*, at 382:

> "Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> "It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."

See also *Bartkus* v. *Illinois*, 359 U. S. 121 (1959); *Westfall* v. *United States*, 274 U. S. 256, 258 (1927) (Holmes, J.) (the proposition that the State and Federal Governments may punish the same conduct "is too plain to need more than statement").

The States are no less sovereign with respect to each other than they are with respect to the Federal Government. Their powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment. See *Lanza*, *supra*, at 382. The States are equal to each other "in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle* v. *Oklahoma*, 221 U. S. 559, 567 (1911). See *Skiriotes* v. *Florida*, 313 U. S. 69, 77 (1941). Thus, "[e]ach has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each 'is exercising its own sovereignty, not that of the

other.'" *Wheeler, supra,* at 320 (quoting *Lanza, supra,* at 382).

The cases in which the Court has applied the dual sovereignty principle outside the realm of successive federal and state prosecutions illustrate the soundness of this analysis. *United States* v. *Wheeler, supra,* is particularly instructive because there the Court expressly refused to find that only the State and Federal Governments could be considered distinct sovereigns with respect to each other for double jeopardy purposes, stating that "so restrictive a view of [the dual sovereignty] concept . . . would require disregard of the very words of the Double Jeopardy Clause." *Id.*, at 330. Instead, the *Wheeler* Court reiterated the principle that the sovereignty of two prosecuting entities for these purposes is determined by "the ultimate source of the power under which the respective prosecutions were undertaken." *Id.*, at 320. On the basis of this reasoning, the Court held that the Navajo Tribe, whose power to prosecute its members for tribal offenses is derived from the Tribe's "primeval sovereignty" rather than a delegation of federal authority, is an independent sovereign from the Federal Government for purposes of the dual sovereignty doctrine. *Id.*, at 328.

In those instances where the Court has found the dual sovereignty doctrine inapplicable, it has done so because the two prosecuting entities did not derive their powers to prosecute from independent sources of authority. Thus, the Court has held that successive prosecutions by federal and territorial courts are barred because such courts are "creations emanating from the same sovereignty." *Puerto Rico,* 302 U. S., at 264. See *id.*, at 264–266. See also *Grafton, supra* (the Philippine Islands). Similarly, municipalities that derive their power to try a defendant from the same organic law that empowers the State to prosecute are not separate sovereigns with respect to the State. See, *e. g., Waller, supra.* These cases confirm that it is the presence of independent sovereign authority to prosecute, not the relation between States and the Federal Gov-

ernment in our federalist system, that constitutes the basis for the dual sovereignty doctrine.

Petitioner argues that *Nielsen* v. *Oregon*, 212 U. S. 315 (1909), indicates, albeit in dicta, that where States have concurrent jurisdiction over a criminal offense, the first State to prosecute thereby bars prosecution by any other State. We find that *Nielsen* is limited to its unusual facts and has continuing relevance, if at all, only to questions of jurisdiction between two entities deriving their concurrent jurisdiction from a single source of authority. In *Nielsen*, the Court set aside a conviction obtained by the State of Oregon against a resident of the State of Washington for his operation of a purse net for fish in the Columbia River pursuant to a valid license to do so from the State of Washington. The Court noted:

> "By the legislation of Congress the Columbia River is made the common boundary between Oregon and Washington, and to each of those States is given concurrent jurisdiction on the waters of that river." *Id.*, at 319. "[T]he grant of concurrent jurisdiction may bring up from time to time . . . some curious and difficult questions, so we properly confine ourselves to the precise question presented. . . . It is enough to decide, as we do, that for an act done within the territorial limits of the State of Washington under authority and license from that State one cannot be prosecuted and punished by the State of Oregon." *Id.*, at 320–321.

It is obvious that the *Nielsen* Court did not attempt to decide or even to consider the double jeopardy effect of successive state prosecutions for offenses proscribed by both States; the case, therefore, has no bearing on the issue of the applicability of the dual sovereignty doctrine presented in this case.

III

Petitioner invites us to restrict the applicability of the dual sovereignty principle to cases in which two governmental

entities, having concurrent jurisdiction and pursuing quite different interests, can demonstrate that allowing only one entity to exercise jurisdiction over the defendant will interfere with the unvindicated interests of the second entity and that multiple prosecutions therefore are necessary for the satisfaction of the legitimate interests of both entities. This balancing of interests approach, however, cannot be reconciled with the dual sovereignty principle. This Court has plainly and repeatedly stated that two identical offenses are *not* the "same offence" within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns. See, *e. g.*, *United States* v. *Lanza*, 260 U. S. 377 (1922) (same conduct, indistinguishable statutes, same "interests"). If the States are separate sovereigns, as they must be under the definition of sovereignty which the Court consistently has employed, the circumstances of the case are irrelevant.

Petitioner, then, is asking the Court to discard its sovereignty analysis and to substitute in its stead his difficult and uncertain balancing of interests approach. The Court has refused a similar request on at least one previous occasion, see *Abbate* v. *United States*, 359 U. S. 187 (1959); *id.*, at 196 (BRENNAN, J., separate opinion), and rightfully so. The Court's express rationale for the dual sovereignty doctrine is not simply a fiction that can be disregarded in difficult cases. It finds weighty support in the historical understanding and political realities of the States' role in the federal system and in the words of the Double Jeopardy Clause itself, "nor shall any person be subject for the same *offence* to be twice put in jeopardy of life or limb." U. S. Const., Amdt. 5 (emphasis added). See *Wheeler*, 435 U. S., at 330.

It is axiomatic that "[i]n America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."

McCulloch v. *Maryland*, 4 Wheat. 316, 410 (1819). It is as well established that the States, "as political communities, [are] distinct and sovereign, and consequently foreign to each other." *Bank of United States* v. *Daniel*, 12 Pet. 32, 54 (1838). See also *Skiriotes* v. *Florida*, 313 U. S., at 77; *Coyle* v. *Oklahoma*, 221 U. S., at 567. The Constitution leaves in the possession of each State "certain exclusive and very important portions of sovereign power." The Federalist No. 9, p. 55 (J. Cooke ed. 1961). Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code. See, *e. g.*, *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U. S. 592, 601 (1982); *McCulloch*, *supra*, at 418. To deny a State its power to enforce its criminal laws because another State has won the race to the courthouse "would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines." *Bartkus*, 359 U. S., at 137.

Such a deprivation of a State's sovereign powers cannot be justified by the assertion that under "interest analysis" the State's legitimate penal interests will be satisfied through a prosecution conducted by another State. A State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of *its* own laws. Just as the Federal Government has the right to decide that a state prosecution has not vindicated a violation of the "peace and dignity" of the Federal Government, a State must be entitled to decide that a prosecution by another State has not satisfied its legitimate sovereign interest. In recognition of this fact, the Court consistently has endorsed the principle that a single act constitutes an "offence" against each sovereign whose laws are violated by that act. The Court has always understood the words of the Double Jeopardy Clause to reflect this fundamental principle, and we see no reason why we should reconsider that understanding today.

The judgment of the Supreme Court of Alabama is affirmed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I concur wholeheartedly in JUSTICE MARSHALL's dissent. I write separately only to clarify my views on the role that "different interests" should play in determining whether two prosecutions are "for the same offence" within the meaning of the Double Jeopardy Clause.

In *Abbate* v. *United States*, 359 U. S. 187 (1959), in addition to arguing that the dual sovereignty doctrine permitted successive state and federal prosecutions, the Federal Government also urged that the federal prosecution was not barred because the two prosecutions were not "for the same offense." The Government's theory was that, because the federal and state statutes involved had divergent *specific purposes*—the federal law to protect communications and the state law to protect private property—and thus promoted different "interests," the prosecutions were really for different offenses.

I rejected this argument in a separate opinion. *Id.*, at 196–201. My concern was that "this reasoning would apply equally if each of two successive *federal* prosecutions based on the same acts was brought under a different *federal* statute, and each statute was designed to protect a different federal interest." *Id.*, at 197 (emphasis in original). That result I found clearly barred by the Fifth Amendment.*

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*I illustrated how radical and pernicious a revision in existing double jeopardy jurisprudence the Government's theory might work by referring to *In re Nielsen*, 131 U. S. 176 (1889). *Abbate* v. *United States*, 359 U. S., at 201. In *Nielsen*, the defendant, a Mormon with more than one wife, had been convicted of violating two separate congressional statutes that applied to the Territory of Utah in two successive prosecutions. In the first prosecution he was tried for and convicted of cohabiting with more

I adhere to the position I took in *Abbate*, that the different purposes or interests served by specific statutes cannot justify an exception to our established double jeopardy law. However, I read JUSTICE MARSHALL's dissent to use "interest" analysis in another context. He employs it to demonstrate the qualitative difference in the general nature of federal and state interests and the qualitative similarity in the nature of States' interest. JUSTICE MARSHALL's use of this interest analysis furthers, rather than undermines, the purposes of the Double Jeopardy Clause. Based on this understanding, I join JUSTICE MARSHALL's dissent.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Seizing upon the suggestion in past cases that every "independent" sovereign government may prosecute violations of its laws even when the defendant has already been tried for the same crime in another jurisdiction, the Court today gives short shrift to the policies underlying those precedents. The "dual sovereignty" doctrine, heretofore used to permit federal and state prosecutions for the same offense, was born of the need to accommodate complementary state and federal concerns within our system of concurrent territorial jurisdictions. It cannot justify successive prosecutions by different States. Moreover, even were the dual sovereignty doctrine to support successive state prosecutions as a general matter, it simply could not legitimate the collusion between Georgia and Alabama in this case to ensure that petitioner is executed for his crime.

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than one woman, in the second he was tried for and convicted of adultery. The Court correctly held that the second prosecution had unconstitutionally placed the defendant twice in jeopardy for the same offense. Under the rule the Government proposed in *Abbate*, however, the mere difference between the interests in prohibiting multiple sexual partners and in proscribing extramarital sexual relationships would have permitted successive prosecutions.

I

On August 31, 1981, the body of Rebecca Heath was discovered in an abandoned car in Troup County, Georgia. Because the deceased was a resident of Russell County, Alabama, members of the Russell County Sheriff's Department immediately joined Troup County authorities in investigating the causes and agents of her death. Tr. 359. This cooperative effort proved fruitful. On September 4, petitioner Larry Heath, the deceased's husband, was arrested and brought to the Georgia State Patrol barracks in Troup County, where he confessed to having hired other men to murder his wife. Shortly thereafter, petitioner was indicted by the grand jury of Troup County for malice murder. The prosecution's notice to petitioner that it was seeking the death penalty triggered the beginning of the Unified Appeals Procedure that Georgia requires in capital cases. But while these pretrial proceedings were still in progress, petitioner seized the prosecution's offer of a life sentence in exchange for a guilty plea. Upon entry of his plea in February 1982, petitioner was sentenced in Troup County Superior Court to life imprisonment. His stay in the custody of Georgia authorities proved short, however. Three months later, a Russell County, Alabama, grand jury indicted him for the capital offense of murdering Rebecca Heath during the course of a kidnaping in the first degree.

The murder of Rebecca Heath must have been quite noteworthy in Russell County, Alabama. By petitioner's count, of the 82 prospective jurors questioned before trial during *voir dire*, all but 7 stated that they were aware that petitioner had pleaded guilty to the same crime in Georgia. *Id.*, at 294. The *voir dire* responses of almost all of the remaining 75 veniremen can only be characterized as remarkable. When asked whether they could put aside their knowledge of the prior guilty plea in order to give petitioner a fair trial in Alabama, the vast majority answered in the affirmative. See, *e. g.*, *id.*, at 110, 112–113, 134, 254. These answers sat-

isfied the trial judge, who denied petitioner's challenges for cause except as to those jurors who explicitly admitted that the Georgia proceedings would probably affect their assessment of petitioner's guilt.

With such a well-informed jury, the outcome of the trial was surely a foregone conclusion. Defense counsel could do little but attempt to elicit information from prosecution witnesses tending to show that the crime was committed exclusively in Georgia. The court having rejected petitioner's constitutional and jurisdictional claims, the defense was left to spend most of its summation arguing that Rebecca Heath may not actually have been kidnaped from Alabama before she was murdered and that petitioner was already being punished for ordering that murder. Petitioner was convicted and, after sentencing hearings, was condemned to die. The conviction and sentence were upheld by the Alabama Court of Criminal Appeals, 455 So. 2d 898 (1983), and the Alabama Supreme Court. *Ex parte Heath*, 455 So. 2d 905 (1984).

II

Had the Georgia authorities suddenly become dissatisfied with the life sentence petitioner received in their courts and reindicted petitioner in order to seek the death penalty once again, that indictment would without question be barred by the Double Jeopardy Clause of the Fifth Amendment, as applied to the States by the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784 (1969). Whether the second indictment repeated the charge of malice murder or instead charged murder in the course of a kidnaping, it would surely, under any reasonable constitutional standard, offend the bar to successive prosecutions for the same offense. See *Brown* v. *Ohio*, 432 U. S. 161, 166 (1977); *id.*, at 170 (BRENNAN, J., concurring).

The only difference between this case and such a hypothetical volte-face by Georgia is that here Alabama, not Georgia, was offended by the notion that petitioner might

not forfeit his life in punishment for his crime. The only reason the Court gives for permitting Alabama to go forward is that Georgia and Alabama are separate sovereigns.

A

The dual sovereignty theory posits that where the same act offends the laws of two sovereigns, "it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable." *Moore* v. *Illinois*, 14 How. 13, 20 (1852). Therefore, "prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, 'subject [the defendant] for the same offence to be twice put in jeopardy.'" *United States* v. *Wheeler*, 435 U. S. 313, 317 (1978). Mindful of the admonitions of Justice Black, we should recognize this exegesis of the Clause as, at best, a useful fiction and, at worst, a dangerous one. See *Bartkus* v. *Illinois*, 359 U. S. 121, 158 (1959) (Black, J., dissenting). No evidence has ever been adduced to indicate that the Framers intended the word "offence" to have so restrictive a meaning.[1]

This strained reading of the Double Jeopardy Clause has survived and indeed flourished in this Court's cases not because of any inherent plausibility, but because it provides reassuring interpretivist support for a rule that accommodates the unique nature of our federal system. Before this rule is extended to cover a new class of cases, the reasons for its creation should therefore be made clear.

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[1] It is curious to note how reluctant the Court has always been to ascertain the intent of the Framers in this area. The furthest the Court has ever progressed on such an inquiry was to note: "It has not been deemed relevant to discussion of our problem to consider dubious English precedents concerning the effect of foreign criminal judgments on the ability of English courts to try charges arising out of the same conduct . . . ." *Bartkus* v. *Illinois*, 359 U. S., at 128, n. 9. But see *id.*, at 156 (Black, J., dissenting); M. Friedland, Double Jeopardy 360–364 (1969).

Under the constitutional scheme, the Federal Government has been given the exclusive power to vindicate certain of our Nation's sovereign interests, leaving the States to exercise complementary authority over matters of more local concern. The respective spheres of the Federal Government and the States may overlap at times, and even where they do not, different interests may be implicated by a single act. See, *e. g.*, *Abbate* v. *United States*, 359 U. S. 187 (1959) (conspiracy to dynamite telephone company facilities entails both destruction of property and disruption of federal communications network). Yet were a prosecution by a State, however zealously pursued, allowed to preclude further prosecution by the Federal Government for the same crime, an entire range of national interests could be frustrated. The importance of those federal interests has thus quite properly been permitted to trump a defendant's interest in avoiding successive prosecutions or multiple punishments for the same crime. See *Screws* v. *United States*, 325 U. S. 91, 108–110, and n. 10 (1945) (plurality opinion). Conversely, because "the States under our federal system have the principal responsibility for defining and prosecuting crimes," *Abbate* v. *United States*, *supra*, at 195, it would be inappropriate—in the absence of a specific congressional intent to pre-empt state action pursuant to the Supremacy Clause—to allow a federal prosecution to preclude state authorities from vindicating "the historic right and obligation of the States to maintain peace and order within their confines," *Bartkus* v. *Illinois*, *supra*, at 137.

The complementary nature of the sovereignty exercised by the Federal Government and the States places upon a defendant burdens commensurate with concomitant privileges. Past cases have recognized that the special ordeal suffered by a defendant prosecuted by both federal and state authorities is the price of living in a federal system, the cost of dual citizenship. Every citizen, the Court has noted, "owes allegiance to the two departments, so to speak, and within their

respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction." *United States* v. *Cruikshank*, 92 U. S. 542, 551 (1876). See *Moore* v. *Illinois*, *supra*, at 20 ("Every citizen . . . may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either").

B

Because all but one of the cases upholding the dual sovereignty doctrine have involved the unique relationship between the Federal Government and the States,[2] the question whether a similar rule should exempt successive prosecutions by two different States from the command of the Double Jeopardy Clause is one for which this Court's precedents provide all too little illumination. Only once before has the Court explicitly considered competing state prosecutorial interests. In that case, it observed that where an act is prohibited by the laws of two States with concurrent jurisdiction over the locus of the offense

> "the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both States, so that one convicted or acquitted in the courts of the one State cannot be prosecuted for the same offense in the courts of the other." *Nielsen* v. *Oregon*, 212 U. S. 315, 320 (1909).

Where two States seek to prosecute the same defendant for the same crime in two separate proceedings, the justifica-

[2] *United States* v. *Wheeler*, 435 U. S. 313 (1978), where the Court upheld successive prosecutions by Federal Government and Navajo tribal authorities, merely recognizes an analogous relationship between two governments with complementary concerns. While the Court noted that "Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government," *id.*, at 319, Congress has in fact wisely refrained from interfering in this sensitive area. The relationship between federal and tribal authorities is thus in this respect analogous to that between the Federal Government and the States.

tions found in the federal-state context for an exemption from double jeopardy constraints simply do not hold. Although the two States may have opted for different policies within their assigned territorial jurisdictions, the sovereign concerns with whose vindication each State has been charged are identical. Thus, in contrast to the federal-state context, barring the second prosecution would still permit one government to act upon the broad range of sovereign concerns that have been reserved to the States by the Constitution. The compelling need in the federal-state context to subordinate double jeopardy concerns is thus considerably diminished in cases involving successive prosecutions by different States. Moreover, from the defendant's perspective, the burden of successive prosecutions cannot be justified as the *quid pro quo* of dual citizenship.

To be sure, a refusal to extend the dual sovereignty rule to state-state prosecutions would preclude the State that has lost the "race to the courthouse" from vindicating legitimate policies distinct from those underlying its sister State's prosecution. But as yet, I am not persuaded that a State's desire to further a particular policy should be permitted to deprive a defendant of his constitutionally protected right not to be brought to bar more than once to answer essentially the same charges.

III

Having expressed my doubts as to the Court's ill-considered resolution of the dual sovereignty question in this case, I must confess that my quarrel with the Court's disposition of this case is based less upon how this question was resolved than upon the fact that it was considered at all. Although, in granting Heath's petition for certiorari, this Court ordered the parties to focus upon the dual sovereignty issue, I believe the Court errs in refusing to consider the fundamental unfairness of the process by which petitioner stands condemned to die.

Even where the power of two sovereigns to pursue separate prosecutions for the same crime has been undisputed, this Court has barred both governments from combining to do together what each could not constitutionally do on its own. See *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964); *Elkins* v. *United States*, 364 U. S. 206 (1960).[3] And just as the Constitution bars one sovereign from facilitating another's prosecution by delivering testimony coerced under promise of immunity or evidence illegally seized, I believe that it prohibits two sovereigns from combining forces to ensure that a defendant receives only the trappings of criminal process as he is sped along to execution.

While no one can doubt the propriety of two States cooperating to bring a criminal to justice, the cooperation between Georgia and Alabama in this case went far beyond their initial joint investigation. Georgia's efforts to secure petitioner's execution did not end with its acceptance of his guilty plea. Its law enforcement officials went on to play leading roles as prosecution witnesses in the Alabama trial. Indeed, had the Alabama trial judge not restricted the State to one assisting officer at the prosecution's table during trial, a Georgia officer would have shared the honors with an Alabama officer. Tr. 298. Although the record does not reveal

[3] To be sure, *Murphy*, which bars a State from compelling a witness to give testimony that might be used against him in a federal prosecution, and *Elkins*, which bars the introduction in a federal prosecution of evidence illegally seized by state officers, do not necessarily undermine the basis of the rule allowing successive state and federal prosecutions. It is one thing to bar a sovereign from using certain evidence and quite another to bar it from prosecuting altogether. But these cases can be read to suggest that despite the independent sovereign status of the Federal and State Governments, courts should not be blind to the impact of combined federal-state law enforcement on an accused's constitutional rights. See Note, Double Prosecution by State and Federal Governments: Another Exercise in Federalism, 80 Harv. L. Rev. 1538, 1547 (1967). Justice Harlan's belief that *Murphy* "abolished the 'two sovereignties' rule," *Stevens* v. *Marks*, 383 U. S. 234, 250 (1966) (Harlan, J., concurring in part, dissenting in part), was thus well founded.

the precise nature of the assurances made by Georgia authorities that induced petitioner to plead guilty in the first proceeding against him, I cannot believe he would have done so had he been aware that the officials whose forbearance he bought in Georgia with his plea would merely continue their efforts to secure his death in another jurisdiction. Cf. *Santobello* v. *New York*, 404 U. S. 257, 262 (1971).

Even before the Fourteenth Amendment was held to incorporate the protections of the Double Jeopardy Clause, four Members of this Court registered their outrage at "an instance of the prosecution being allowed to harass the accused with repeated trials and convictions on the same evidence, until it achieve[d] its desired result of a capital verdict." *Ciucci* v. *Illinois*, 356 U. S. 571, 573 (1958). Such "relentless prosecutions," they asserted, constituted "an unseemly and oppressive use of a criminal trial that violates the concept of due process contained in the Fourteenth Amendment, whatever its ultimate scope is taken to be." *Id.*, at 575. The only differences between the facts in *Ciucci* and those in this case are that here the relentless effort was a cooperative one between two States and that petitioner sought to avoid trial by pleading guilty. Whether viewed as a violation of the Double Jeopardy Clause or simply as an affront to the due process guarantee of fundamental fairness, Alabama's prosecution of petitioner cannot survive constitutional scrutiny. I therefore must dissent.

MILLER *v.* FENTON, SUPERINTENDENT, RAHWAY STATE PRISON, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84–5786. Argued October 16, 1985—Decided December 3, 1985

Petitioner, after a 58-minute interrogation at the New Jersey State Police Barracks, confessed to a murder. The New Jersey trial court rejected his motion to suppress the confession, and the jury found him guilty of first-degree murder. The New Jersey Superior Court Appellate Division reversed, finding as a matter of law that the confession was the result of compulsion and thus was impermissible under the Fourteenth Amendment's due process guarantee. The New Jersey Supreme Court reversed, finding, after examining the "totality of all the surrounding circumstances," that the interrogation was proper and that the resulting confession, being voluntary, had been properly admitted into evidence. Petitioner then sought a writ of habeas corpus in Federal District Court, which dismissed the petition without an evidentiary hearing. The Court of Appeals affirmed, holding that the voluntariness of a confession is a "factual issue" within the meaning of 28 U. S. C. § 2254(d), which provides that state-court findings of fact, with certain exceptions, "shall be presumed to be correct" in a federal habeas corpus proceeding, and that accordingly federal review of the New Jersey Supreme Court's determination that petitioner's confession was voluntary was limited to whether that court applied the proper legal test and whether its factual conclusions were supported by the record. Under this standard, the Court of Appeals concluded that the District Court's denial of the habeas corpus petition was proper.

Held: The voluntariness of a confession is not an issue of fact entitled to the § 2254(d) presumption but is a legal question meriting independent consideration in a federal habeas corpus proceeding. Pp. 109–118.

(a) There is no support in this Court's decisions for the suggestion that the enactment of § 2254(d) in 1966 altered this Court's prior confession cases holding that the ultimate issue of "voluntariness" is a legal question requiring independent federal determination. More importantly, § 2254(d)'s history undermines any argument that Congress intended that the ultimate question of the admissibility of a confession be treated as a "factual issue" within the meaning of that provision. Pp. 109–112.

(b) In addition to considerations of *stare decisis* and congressional intent, the nature of the "voluntariness" inquiry itself lends support to the

holding in this case. Moreover, the practical considerations that have led this Court to find other issues within the scope of the § 2254(d) presumption are absent in the confession context. Unlike such issues as the impartiality of a juror or competency to stand trial, assessments of credibility and demeanor are not crucial to the proper resolution of the ultimate issue of voluntariness. And the critical events surrounding the taking of a confession almost invariably occur, not in open court, but in a secret and more coercive environment. Pp. 112–118.

741 F. 2d 1456, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 118.

Paul Martin Klein argued the cause for petitioner. With him on the briefs were *Thomas S. Smith* and *Claudia Van Wyk*.

Anne C. Paskow, Deputy Attorney General of New Jersey, argued the cause for respondents. With her on the brief were *Irwin I. Kimmelman*, Attorney General, and *Allan J. Nodes* and *Debra L. Stone*, Deputy Attorneys General.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Under 28 U. S. C. § 2254(d), state-court findings of fact "shall be presumed to be correct" in a federal habeas corpus proceeding unless one of eight enumerated exceptions applies.[1] The question presented is whether the voluntariness

**Charles S. Sims* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

[1] In pertinent part, 28 U. S. C. § 2254(d) provides:

"In any proceeding instituted in a Federal Court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct, unless . . .

. . . . . .

"(8) . . . the Federal court . . . concludes that such factual determination is not supported by the record as a whole."

of a confession is an issue of fact entitled to the § 2254(d) presumption.

I

On the morning of August 13, 1973, a stranger approached the rural New Jersey home of 17-year-old Deborah Margolin and told her that a heifer was loose at the foot of her driveway. She set out alone to investigate and never returned. Later that day, her mutilated body was found in a nearby stream.

The victim's brothers were able to provide a description of the stranger's car and clothing. Based on this information, officers of the New Jersey State Police tentatively identified petitioner and, later that evening, found him at his place of employment. Petitioner responded to the officers' preliminary inquiries and agreed to return to the police barracks for further questioning. Approximately two hours later, Detective Charles Boyce led petitioner to an interrogation room and informed him of his *Miranda* rights. Petitioner inquired about the scope of his privilege to remain silent and then executed a written waiver, the validity of which is not at issue.

A 58 minute long interrogation session ensued. During the course of the interview, Detective Boyce told petitioner that Ms. Margolin had just died. That statement, which Boyce knew to be untrue, supported another officer's earlier, and equally false, suggestion that the victim was still alive and could identify her attacker. App. 16–17; Record 109 and 305. Detective Boyce also told petitioner that he had been identified at the Margolin home earlier in the day. In fact, Ms. Margolin's brothers had only provided a general description of the stranger's car and clothing. Finally, Detective Boyce indicated that blood stains had been found on petitioner's front stoop. No such evidence was introduced at trial, and respondents do not now contend that it ever in fact existed.

Throughout the interview, Detective Boyce presented himself as sympathetic to petitioner's plight. On several

occasions, he stated that he did not consider petitioner to be a criminal because the perpetrator of the deed had a "mental problem" and needed medical help rather than punishment. App. 19.[2] Eventually, petitioner fully confessed to the crime. After doing so, he lapsed into what Detective Boyce described as a "state of shock." Record 84–85. Repeated

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[2]The following exchange is representative of the tone of the interrogation.

"Boyce: 'Frank, look, you want help, don't you, Frank?'

"Miller: 'Yes, uh huh, yes, but yet I'm, I'm not going to admit to something that, that I wasn't involved in.'

"Boyce: 'We don't want you to, all I want you to do is talk to me, that's all. I'm not talking about admitting to anything Frank. I want you to talk to me. I want you to tell me what you think. I want you to tell me how you think about this, what you think about this?'

"Miller: 'What I think about it?'

"Boyce: 'Yeah.'

"Miller: 'I think whoever did it really needs help.'

"Boyce: 'And that's what I think and that's what I know. They don't, they don't need punishment, right? Like you said, they need help.'

"Miller: 'Right.'

. . . . .

"Boyce: 'Now, don't you think it's better if someone knows that he or she has a mental problem to come forward with it and say, look, I've, I've, I've done these acts, I'm responsible for this, but I want to be helped, I couldn't help myself, I had no control of myself and if I'm examined properly you'll find out that's the case.'

. . . . .

"'Okay. [L]isten Frank, [i]f I promise to, you know, do all I can with the psychiatrist and everything, and we get the proper help for you . . . will you talk to me about it.'

"Miller: 'I can't talk to you about something I'm not . . .'

"Boyce: 'Alright, listen Frank, alright, honest. I know, I know what's going on inside you, Frank. I want to help you, you know, between us right now. . . . You've got to talk to me about it. This is the only way we'll be able to work it out. I mean, you know, listen, I want to help you, because you are in my mind, you are not responsible. You are not responsible, Frank. Frank, what's the matter?'

"Miller: 'I feel bad.'" App. 17–22.

efforts to rouse him from his stupor failed, and the police summoned an ambulance to transport him to the hospital.

The trial court rejected petitioner's motion to suppress the confession, and the jury found petitioner guilty of murder in the first degree. The Superior Court Appellate Division reversed, finding as a matter of law that the confession was the result of "intense and mind bending psychological compulsion" and therefore was impermissible under the Fourteenth Amendment's guarantee of due process. App. 53. Over three dissents, the Supreme Court of New Jersey reversed again. *State* v. *Miller*, 76 N. J. 392, 388 A. 2d 218 (1978). After examining the "totality of all the surrounding circumstances," including petitioner's educational level, age, and awareness of his *Miranda* rights, the court found that the interrogation "did not exceed proper bounds," and that the resulting confession, being voluntary, had been properly admitted into evidence. *Id.*, at 402–405, 388 A. 2d, at 223–224.

Petitioner then sought a writ of habeas corpus in the United States District Court for the District of New Jersey. That court dismissed the application without an evidentiary hearing. A divided panel of the Court of Appeals for the Third Circuit affirmed. 741 F. 2d 1456 (1984). Relying on Circuit precedent,[3] the court held that the voluntariness of a confession is a "factual issue" within the meaning of 28 U. S. C. § 2254(d). Accordingly, federal review of the New Jersey Supreme Court's determination that petitioner's confession was voluntary was "limited to whether the state court applied the proper legal test, and whether [its] factual conclusions . . . [were] supported on the record as a whole." 741 F. 2d, at 1462. Under this standard, the court concluded,

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[3] The Court of Appeals relied on an earlier decision of that court holding that the "voluntariness" of a waiver of *Miranda* rights was entitled to the § 2254(d) presumption. *Patterson* v. *Cuyler*, 729 F. 2d 925, 930 (1984). The present case presents no occasion for us to address the question whether federal habeas courts must accord the statutory presumption of correctness to state-court findings concerning the validity of a waiver.

the District Court's denial of the petition for habeas relief was proper.

Because the Courts of Appeals have reached differing conclusions on whether state-court voluntariness determinations are entitled to the § 2254(d) presumption of correctness, and because of the issue's importance to the administration of criminal justice, we granted certiorari. 471 U. S. 1003 (1985). Compare *Brantley* v. *McKaskle*, 722 F. 2d 187, 188 (CA5 1984) "([V]oluntariness of a confession is a mixed question of law and fact"), with *Alexander* v. *Smith*, 582 F. 2d 212, 217 (CA2) (state-court voluntariness determination entitled to § 2254(d) presumption), cert. denied, 439 U. S. 990 (1978). We now reverse and remand.

II

This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment. *Brown* v. *Mississippi*, 297 U. S. 278 (1936), was the wellspring of this notion, now deeply embedded in our criminal law. Faced with statements extracted by beatings and other forms of physical and psychological torture, the Court held that confessions procured by means "revolting to the sense of justice" could not be used to secure a conviction. *Id.*, at 286. On numerous subsequent occasions the Court has set aside convictions secured through the admission of an improperly obtained confession. See, *e. g.*, *Mincey* v. *Arizona*, 437 U. S. 385 (1978); *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Chambers* v. *Florida*, 309 U. S. 227, 235–238 (1940). Although these decisions framed the legal inquiry in a variety of different ways, usually through the "convenient shorthand" of asking whether the confession was "involuntary," *Blackburn* v. *Alabama*, 361 U. S. 199, 207 (1960), the Court's analysis has

consistently been animated by the view that "ours is an accusatorial and not an inquisitorial system," *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961), and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness. Indeed, even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations, *Miranda* v. *Arizona*, 384 U. S. 436, 478 (1966), and is binding on the States, *Malloy* v. *Hogan*, 378 U. S. 1, 6 (1964), the Court has continued to measure confessions against the requirements of due process. See, *e. g.*, *Mincey* v. *Arizona*, *supra*, at 402; *Beecher* v. *Alabama*, 389 U. S. 35, 38 (1967) *(per curiam)*.

Without exception, the Court's confession cases hold that the ultimate issue of "voluntariness" is a legal question requiring independent federal determination. See, *e. g.*, *Haynes* v. *Washington*, *supra*, at 515–516; *Ashcraft* v. *Tennessee*, *supra*, at 147–148. As recently as 1978, the Court reaffirmed that it was "not bound by" a state-court voluntariness finding and reiterated its historic "duty to make an independent evaluation of the record." *Mincey* v. *Arizona*, *supra*, at 398. That duty, as *Mincey* makes explicit, is not limited to instances in which the claim is that the police conduct was "inherently coercive." *Ashcraft* v. *Tennessee*, *supra*, at 154. It applies equally when the interrogation techniques were improper only because, in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will. See *Mincey* v. *Arizona*, *supra*, at 401. Because the ultimate issue in both categories of cases is the same—whether the State has obtained the confession in a manner that comports with due process—the decisions leave no doubt that our independent obligation to decide the constitutional question is identical.

Mincey, *Ashcraft*, and many of the early decisions applying the independent-determination rule in confession cases came

to the Court on direct appeal from state-court judgments. The rule, however, is no less firmly established in cases coming to the federal system on application for a writ of habeas corpus. *Davis* v. *North Carolina*, 384 U. S. 737 (1966), resolved the issue with unmistakable clarity. There, the State had admitted into evidence a confession elicited from an impoverished, mentally deficient suspect who had been held incommunicado for 16 days with barely adequate nourishment. Expressly relying on the direct-appeal cases, the Court stated unequivocally that state-court determinations concerning the ultimate question of the voluntariness of a confession are not binding in a federal habeas corpus proceeding. *Id.*, at 741–742.

Davis was decided four months before 28 U. S. C. § 2254(d) was signed into law. Act of Nov. 2, 1966, Pub. L. 89–711, 80 Stat. 1105. Respondent contends that, whatever may have been the case prior to 1966, the enactment of § 2254(d) in that year fundamentally altered the nature of federal habeas review of state voluntariness findings. That suggestion finds no support in this Court's decisions. See, *e. g.*, *Boulden* v. *Holman*, 394 U. S. 478, 480 (1969) (finding confession voluntary after making "an independent study of the entire record"); *Frazier* v. *Cupp*, 394 U. S. 731, 739 (1969) (examining "totality of the circumstances" to assess admissibility of confession). More importantly, the history of § 2254(d) undermines any argument that Congress intended that the ultimate question of the admissibility of a confession be treated a "factual issue" within the meaning of that provision. The 1966 amendment was an almost verbatim codification of the standards delineated in *Townsend* v. *Sain*, 372 U. S. 293 (1963), for determining when a district court must hold an evidentiary hearing before acting on a habeas petition. When a hearing is not obligatory, *Townsend* held, the federal court "ordinarily should . . . accept the facts as found" in the state proceeding. *Id.*, at 318. Congress elevated that exhortation into a mandatory presumption of

correctness. But there is absolutely no indication that it intended to alter *Townsend*'s understanding that the "ultimate constitutional question" of the admissibility of a confession was a "mixed questio[n] of fact and law" subject to plenary federal review. *Id.*, at 309, and n. 6.

In short, an unbroken line of cases, coming to this Court both on direct appeal and on review of applications to lower federal courts for a writ of habeas corpus, forecloses the Court of Appeals' conclusion that the "voluntariness" of a confession merits something less than independent federal consideration. To be sure, subsidiary factual questions, such as whether a drug has the properties of a truth serum, *id.*, at 306, or whether in fact the police engaged in the intimidation tactics alleged by the defendant, *LaVallee* v. *Delle Rose*, 410 U. S. 690, 693–695 (1973) *(per curiam)*, are entitled to the § 2254(d) presumption. And the federal habeas court, should, of course, give great weight to the considered conclusions of a coequal state judiciary. *Culombe* v. *Connecticut*, 367 U. S. 568, 605 (1961) (opinion of Frankfurter, J.). But, as we now reaffirm, the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination.

III

The Court of Appeals recognized that treating the voluntariness of a confession as an issue of fact was difficult to square with "fifty years of caselaw" in this Court. 741 F. 2d, at 1462. It believed, however, that this substantial body of contrary precedent was not controlling in light of our more recent decisions addressing the scope of the § 2254(d) presumption of correctness. See *Wainwright* v. *Witt*, 469 U. S. 412, 429 (1985) (trial court's determination that a prospective juror in a capital case was properly excluded for cause entitled to presumption); *Patton* v. *Yount*, 467 U. S. 1025 (1984)

(impartiality of an individual juror); *Rushen* v. *Spain*, 464 U. S. 114 (1983) *(per curiam)* (effect of *ex parte* communication on impartiality of individual juror); *Maggio* v. *Fulford*, 462 U. S. 111 (1983) *(per curiam)* (competency to stand trial); *Marshall* v. *Lonberger*, 459 U. S. 422, 431–437 (1983) (determination that defendant received and understood sufficient notice of charges against him to render guilty plea voluntary). We acknowledge that the Court has not charted an entirely clear course in this area. We reject, however, the Court of Appeals' conclusion that these case-specific holdings tacitly overturned the longstanding rule that the voluntariness of a confession is a matter for independent federal determination.

In the § 2254(d) context, as elsewhere, the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485 (1984); *Baumgartner* v. *United States*, 322 U. S. 665, 671 (1944). A few principles, however, are by now well established. For example, that an issue involves an inquiry into state of mind is not at all inconsistent with treating it as a question of fact. See, *e. g.*, *Maggio* v. *Fulford*, *supra*. Equally clearly, an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question. See *Dayton Board of Education* v. *Brinkman*, 443 U. S. 526, 534 (1979) (finding of intent to discriminate subject to "clearly erroneous" standard of review). But beyond these elemental propositions, negative in form, the Court has yet to arrive at "a rule or principle that will unerringly distinguish a factual finding from a legal conclusion." *Pullman-Standard* v. *Swint*, 456 U. S. 273, 288 (1982).

Perhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a "question of law," a "question of fact," or a "mixed question of law and fact" is sometimes as much a matter of allocation as it is of

analysis. See Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 237 (1985). At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question. Where, for example, as with proof of actual malice in First Amendment libel cases, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S., at 503. Similarly, on rare occasions in years past the Court has justified independent federal or appellate review as a means of compensating for "perceived shortcomings of the trier of fact by way of bias or some other factor. . . ." *Id.*, at 518 (REHNQUIST, J., dissenting). See, *e. g.*, *Haynes* v. *Washington*, 373 U. S., at 516; *Watts* v. *Indiana*, 338 U. S. 49, 52 (1949) (opinion of Frankfurter, J.). Cf. *Norris* v. *Alabama*, 294 U. S. 587 (1935).

In contrast, other considerations often suggest the appropriateness of resolving close questions concerning the status of an issue as one of "law" or "fact" in favor of extending deference to the trial court. When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight. *Patton* v. *Yount*, *supra*, and *Wainwright* v. *Witt*, *supra*, are illustrative. There the Court stressed that the state trial judge is in a position to assess juror bias that is far superior to that of federal judges reviewing an application for a writ of habeas corpus. Principally

for that reason, the decisions held, juror bias merits treatment as a "factual issue" within the meaning of § 2254(d) notwithstanding the intimate connection between such determinations and the constitutional guarantee of an impartial jury.

For several reasons we think that it would be inappropriate to abandon the Court's longstanding position that the ultimate question of the admissibility of a confession merits treatment as a legal inquiry requiring plenary federal review. We note at the outset that we do not write on a clean slate. "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions." *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375, 403 (1970). Thus, even assuming that contemporary considerations supported respondent's construction of the statute, nearly a half century of unwavering precedent weighs heavily against any suggestion that we now discard the settled rule in this area. Moreover, as previously noted, Congress patterned § 2254(d) after *Townsend* v. *Sain*, 372 U. S. 293 (1963), a case that clearly assumed that the voluntariness of a confession was an issue for independent federal determination. Thus, not only are *stare decisis* concerns compelling, but, unlike in *Marshall* v. *Lonberger*, 459 U. S. 422 (1983), *Rushen* v. *Spain*, 464 U. S. 114 (1983), or any of our other recent § 2254(d) cases, in the confession context we have the benefit of some congressional guidance in resolving whether the disputed issue falls outside of the scope of the § 2254(d) presumption. Although the history of that provision is not without its ambiguities, it is certainly clear enough to tip the scales in favor of treating the voluntariness of a confession as beyond the reach of § 2254(d).

In addition to considerations of *stare decisis* and congressional intent, the nature of the inquiry itself lends support to the conclusion that "voluntariness" is a legal question meriting independent consideration in a federal habeas corpus proceeding. Although sometimes framed as an issue of

"psychological fact," *Culombe* v. *Connecticut*, 367 U. S., at 603, the dispositive question of the voluntariness of a confession has always had a uniquely legal dimension. It is telling that in confession cases coming from the States, this Court has consistently looked to the Due Process Clause of the Fourteenth Amendment to test admissibility. See, *e. g.*, *Mincey* v. *Arizona*, 437 U. S., at 402. The locus of the right is significant because it reflects the Court's consistently held view that the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne. See, *e. g.*, *Gallegos* v. *Colorado*, 370 U. S. 49, 51 (1962) (suggesting that "a compound of two influences" requires that some confessions be condemned); *Culombe* v. *Connecticut*, *supra*, at 605 (describing voluntariness as an "amphibian"). This hybrid quality of the voluntariness inquiry,[4] subsuming, as it does, a "complex of values," *Blackburn* v. *Alabama*, 361 U. S., at 207, itself militates against treating the question as one of simple historical fact.

Putting to one side whether "voluntariness" is analytically more akin to a fact or a legal conclusion, the practical considerations that have led us to find other issues within the scope of the § 2254(d) presumption are absent in the confession context. First, unlike the impartiality of a given juror, *Patton* v. *Yount*, 467 U. S., at 1036, or competency to stand trial, *Maggio* v. *Fulford*, 462 U. S., at 117, assessments of credibil-

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[4]The voluntariness rubric has been variously condemned as "useless," Paulson, The Fourteenth Amendment and the Third Degree, 6 Stan. L. Rev. 411, 430 (1954); "perplexing," Grano, Voluntariness, Free Will, and the Law of Confessions, 65 Va. L. Rev. 859, 863 (1979); and "legal 'double-talk,'" A. Beisel, Control Over Illegal Enforcement of the Criminal Law: Role of the Supreme Court 48 (1955). See generally Y. Kamisar, Police Interrogation and Confessions 1–25 (1980).

ity and demeanor are not crucial to the proper resolution of the ultimate issue of "voluntariness." Of course, subsidiary questions, such as the length and circumstances of the interrogation, the defendant's prior experience with the legal process, and familiarity with the *Miranda* warnings, often require the resolution of conflicting testimony of police and defendant. The law is therefore clear that state-court findings on such matters are conclusive on the habeas court if fairly supported in the record and if the other circumstances enumerated in § 2254(d) are inapplicable. But once such underlying factual issues have been resolved, and the moment comes for determining whether, under the totality of the circumstances, the confession was obtained in a manner consistent with the Constitution, the state-court judge is not in an appreciably better position than the federal habeas court to make that determination.

Second, the allocution of a guilty plea, *Marshall* v. *Lonberger*, *supra*, the adjudication of competency to stand trial, *Maggio* v. *Fulford*, *supra*, and the determination of juror bias, *Wainwright* v. *Witt*, 469 U. S. 412 (1985), take place in open court on a full record. In marked contrast, the critical events surrounding the taking of a confession almost invariably occur in a secret and inherently more coercive environment. *Miranda* v. *Arizona*, 384 U. S., at 458. These circumstances, standing alone, cannot be dispositive of the question whether a particular issue falls within the reach of § 2254(d). However, together with the inevitable and understandable reluctance to exclude an otherwise reliable admission of guilt, *Jackson* v. *Denno*, 378 U. S. 368, 381 (1964), they elevate the risk that erroneous resolution of the voluntariness question might inadvertently frustrate the protection of the federal right. See *Haynes* v. *Washington*, 373 U. S., at 516; *Ward* v. *Texas*, 316 U. S. 547 (1942). We reiterate our confidence that state judges, no less than their federal counterparts, will properly discharge their duty to protect the constitutional rights of criminal defendants. We

note only that in the confession context, independent federal review has traditionally played an important parallel role in protecting the rights at stake when the prosecution secures a conviction through the defendant's own admissions.

IV

After defending at length its conclusion that the voluntariness of a confession was entitled to the § 2254(d) presumption, and after carefully analyzing the petitioner's confession under that standard, the Court of Appeals suggested in a brief footnote that it "would reach the same result" even were it to give the issue plenary consideration. 741 F. 2d, at 1467, n. 21. Inasmuch as it is not clear from this language that the court did in fact independently evaluate the admissibility of the confession, and because, in any event, we think that the case warrants fuller analysis under the appropriate standard, we reverse the decision below and remand for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST, dissenting.

The Court decides that the voluntariness of a confession is not an issue of fact presumed to be correct under 28 U. S. C. § 2254(d). I think it is difficult to sensibly distinguish the determination that a particular confession was voluntary from the determinations which we have held to be entitled to a presumption of correctness under § 2254(d). See *Sumner* v. *Mata*, 449 U. S. 539 (1981); *Sumner* v. *Mata*, 455 U. S. 591 (1982) *(per curiam); Marshall* v. *Lonberger*, 459 U. S. 422, 431–437 (1983); *Maggio* v. *Fulford*, 462 U. S. 111 (1983) *(per curiam); Rushen* v. *Spain*, 464 U. S. 114 (1983) *(per curiam); Patton* v. *Yount*, 467 U. S. 1025, 1036–1038 (1984); and *Wainwright* v. *Witt*, 469 U. S. 412, 426–430 (1985). While the Court relies principally on *stare decisis* for the result it reaches today, almost all the cases upon which it relies entailed direct review by this Court of state-court decisions

rather than federal habeas review. But even if that difference were deemed immaterial, it seems to me that *stare decisis* is not a sufficient reason for excluding a finding as to the voluntariness of a confession from the presumption embodied in § 2254(d). All of the recent cases cited evince a more reasoned approach to this issue than the interesting but somewhat mystical exegesis in cases such as *Culombe* v. *Connecticut*, 367 U. S. 568, 603–605 (1961) (opinion of Frankfurter, J.).

I also disagree with the Court's decision to remand this case to the Court of Appeals for a second run at the voluntariness issue. I think the majority of that court made it clear that it had evaluated the admissibility of the confession under the correct standard as defined by this Court today. It is unfortunate that petitioner's challenge to his conviction for a murder which occurred 12 years ago should be the subject of additional and unnecessary litigation and delay.

I respectfully dissent.

LAKE COAL CO., INC. *v.* ROBERTS & SCHAEFER CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84–1240. Argued October 15, 1985—Decided December 3, 1985

Held: The parties' motion requesting decision of the questions presented in the petition for certiorari despite settlement of the underlying causes of action is denied; the Court of Appeals' judgment is vacated; and the case is remanded for dismissal of the cause as moot.

751 F. 2d 386, vacated and remanded.

Ronald G. Polly argued the cause for petitioner. With him on the briefs was *Gene Smallwood, Jr.*

C. Kilmer Combs argued the cause and filed a brief for respondent.

PER CURIAM.

The motion of the parties requesting the Court to decide the questions presented in the petition for writ of certiorari despite complete settlement of the underlying causes of action is denied. See *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974).

The judgment of the United States Court of Appeals for the Sixth Circuit is vacated, and the case is remanded to the United States District Court for the Eastern District of Kentucky with instructions to dismiss the cause as moot.

UNITED STATES *v.* RIVERSIDE BAYVIEW HOMES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-701. Argued October 16, 1985—Decided December 4, 1985

The Clean Water Act prohibits any discharge of dredged or fill materials into "navigable waters"—defined as the "waters of the United States"—unless authorized by a permit issued by the Army Corps of Engineers (Corps). Construing the Act to cover all "freshwater wetlands" that are adjacent to other covered waters, the Corps issued a regulation defining such wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." After respondent Riverside Bayview Homes, Inc. (hereafter respondent), began placing fill materials on its property near the shores of Lake St. Clair, Michigan, the Corps filed suit in Federal District Court to enjoin respondent from filling its property without the Corps' permission. Finding that respondent's property was characterized by the presence of vegetation requiring saturated soil conditions for growth, that the source of such soil conditions was ground water, and that the wetland on the property was adjacent to a body of navigable water, the District Court held that the property was wetland subject to the Corps' permit authority. The Court of Appeals reversed, construing the Corps' regulation to exclude from the category of adjacent wetlands—and hence from that of "waters of the United States"—wetlands that are not subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation. The court took the view that the Corps' authority under the Act and its implementing regulations must be narrowly construed to avoid a taking without just compensation in violation of the Fifth Amendment. Under this construction, it was held that respondent's property was not within the Corps' jurisdiction, because its semi-aquatic characteristics were not the result of frequent flooding by the nearby navigable waters, and that therefore respondent was free to fill the property without obtaining a permit.

Held:

1. The Court of Appeals erred in concluding that a narrow reading of the Corps' regulatory jurisdiction over wetlands was necessary to avoid a taking problem. Neither the imposition of the permit requirement

itself nor the denial of a permit necessarily constitutes a taking. And the Tucker Act is available to provide compensation for takings that may result from the Corps' exercise of jurisdiction over wetlands. Pp. 126–129.

2. The District Court's findings are not clearly erroneous and plainly bring respondent's property within the category of wetlands and thus of the "waters of the United States" as defined by the regulation in question. Pp. 129–131.

3. The language, policies, and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of material into wetlands adjacent to other "waters of the United States." Pp. 131–139.

729 F. 2d 391, reversed.

WHITE, J., delivered the opinion for a unanimous Court.

Kathryn A. Oberly argued the cause for the United States. With her on the briefs were former *Solicitor General Lee*, *Acting Solicitor General Fried*, *Assistant Attorney General Habicht*, *Deputy Solicitor General Claiborne*, and *Anne S. Almy*.

Edgar B. Washburn argued the cause for respondents. With him on the brief was *Richard K. Gienapp*.*

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*Briefs of *amici curiae* urging reversal were filed for the National Wildlife Federation et al. by *Jerry Jackson*, *Frank J. Kelley*, Attorney General of Michigan, and *Louis Caruso*, Solicitor General; and for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *N. Gregory Taylor* and *Theodora Berger*, Assistant Attorneys General, and *Steven H. Kaufmann* and *David W. Hamilton*, Deputy Attorneys General, *Joseph I. Lieberman*, Attorney General of Connecticut, *Michael A. Lilly*, Attorney General of Hawaii, *Neil F. Hartigan*, Attorney General of Illinois, and *Jill Wine-Banks*, Solicitor General, *William J. Guste, Jr.*, Attorney General of Louisiana, *Stephen H. Sachs*, Attorney General of Maryland, *Hubert H. Humphrey III*, Attorney General of Minnesota, *William L. Webster*, Attorney General of Missouri, *Mike Greely*, Attorney General of Montana, *Robert M. Spire*, Attorney General of Nebraska, *Paul Bardacke*, Attorney General of New Mexico, *Lacy H. Thornburg*, Attorney General of North Carolina, *Arlene Violet*, Attorney General of Rhode Island, *W. J. Michael Cody*, Attorney General of Tennessee, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Charlie Brown*, Attorney General of West Virginia, and *Bronson C. La Follette*, Attorney General of Wisconsin.

JUSTICE WHITE delivered the opinion of the Court.

This case presents the question whether the Clean Water Act (CWA), 33 U. S. C. § 1251 *et seq.*, together with certain regulations promulgated under its authority by the Army Corps of Engineers, authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries.

I

The relevant provisions of the Clean Water Act originated in the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, and have remained essentially unchanged since that time. Under §§ 301 and 502 of the Act, 33 U. S. C. §§ 1311 and 1362, any discharge of dredged or fill materials into "navigable waters"—defined as the "waters of the United States"—is forbidden unless authorized by a permit issued by the Corps of Engineers pursuant to § 404, 33 U. S. C. § 1344.[1] After initially construing the Act to cover only waters navigable in fact, in 1975 the Corps issued interim final regulations redefining "the waters of the United States" to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce. 40 Fed. Reg. 31320

Briefs of *amici curiae* urging affirmance were filed for the American Petroleum Institute by *Stark Ritchie* and *James K. Jackson;* for the Citizens of Chincoteague for a Reasonable Wetlands Policy by *Richard R. Nageotte;* for the Mid-Atlantic Developers Association by *Kenneth D. McPherson;* and for the Pacific Legal Foundation et al. by *Ronald A. Zumbrun* and *Sam Kazman.*

R. Sarah Compton and *Robin S. Conrad* filed a brief for the Chamber of Commerce of the United States as *amicus curiae.*

[1] With respect to certain waters, the Corps' authority may be transferred to States that have devised federally approved permit programs. CWA § 404(g), as added, 91 Stat. 1600, 33 U. S. C. § 1344(g). Absent such an approved program, the Corps retains jurisdiction under § 404 over all "waters of the United States."

(1975). More importantly for present purposes, the Corps construed the Act to cover all "freshwater wetlands" that were adjacent to other covered waters. A "freshwater wetland" was defined as an area that is "periodically inundated" and is "normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." 33 CFR §209.120(d)(2)*(h)* (1976). In 1977, the Corps refined its definition of wetlands by eliminating the reference to periodic inundation and making other minor changes. The 1977 definition reads as follows:

> "The term 'wetlands' means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 33 CFR §323.2(c) (1978).

In 1982, the 1977 regulations were replaced by substantively identical regulations that remain in force today. See 33 CFR §323.2 (1985).[2]

Respondent Riverside Bayview Homes, Inc. (hereafter respondent), owns 80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan. In 1976, respondent began to place fill materials on its property as part of its preparations for construction of a housing development. The Corps of Engineers, believing that the property was an "adjacent wetland" under the 1975 regulation defining "waters of the United States," filed suit in the United States District Court for the Eastern District of Michigan, seeking to enjoin respondent from filling the property without the permission of the Corps.

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[2] The regulations also cover certain wetlands not necessarily adjacent to other waters. See 33 CFR §§ 323.2(a)(2) and (3) (1985). These provisions are not now before us.

The District Court held that the portion of respondent's property lying below 575.5 feet above sea level was a covered wetland and enjoined respondent from filling it without a permit. Civ. No. 77–70041 (Feb. 24, 1977) (App. to Pet. for Cert. 22a); Civ. No. 77–70041 (June 21, 1979) (App. to Pet. for Cert. 32a). Respondent appealed, and the Court of Appeals remanded for consideration of the effect of the intervening 1977 amendments to the regulation. 615 F. 2d 1363 (1980). On remand, the District Court again held the property to be a wetland subject to the Corps' permit authority. Civ. No. 77–70041 (May 10, 1981) (App. to Pet. for Cert. 42a).

Respondent again appealed, and the Sixth Circuit reversed. 729 F. 2d 391 (1984). The court construed the Corps' regulation to exclude from the category of adjacent wetlands—and hence from that of "waters of the United States"—wetlands that were not subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation. The court adopted this construction of the regulation because, in its view, a broader definition of wetlands might result in the taking of private property without just compensation. The court also expressed its doubt that Congress, in granting the Corps jurisdiction to regulate the filling of "navigable waters," intended to allow regulation of wetlands that were not the result of flooding by navigable waters.[3] Under the court's reading of the regulation, respondent's property was not within the Corps' jurisdiction, because its semiaquatic characteristics were not the result of frequent flooding by the nearby navigable waters. Respondent was therefore free to fill the property without obtaining a permit.

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[3] In denying the Government's petition for rehearing, the panel reiterated somewhat more strongly its belief that the Corps' construction of its regulation was "overbroad and inconsistent with the language of the Act." 729 F. 2d, at 401.

We granted certiorari to consider the proper interpretation of the Corps' regulation defining "waters of the United States" and the scope of the Corps' jurisdiction under the Clean Water Act, both of which were called into question by the Sixth Circuit's ruling. 469 U. S. 1206 (1985). We now reverse.

II

The question whether the Corps of Engineers may demand that respondent obtain a permit before placing fill material on its property is primarily one of regulatory and statutory interpretation: we must determine whether respondent's property is an "adjacent wetland" within the meaning of the applicable regulation, and, if so, whether the Corps' jurisdiction over "navigable waters" gives it statutory authority to regulate discharges of fill material into such a wetland. In this connection, we first consider the Court of Appeals' position that the Corps' regulatory authority under the statute and its implementing regulations must be narrowly construed to avoid a taking without just compensation in violation of the Fifth Amendment.

We have frequently suggested that governmental land-use regulation may under extreme circumstances amount to a "taking" of the affected property. See, *e. g.*, *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U. S. 172 (1985); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104 (1978). We have never precisely defined those circumstances, see *id.*, at 123–128; but our general approach was summed up in *Agins* v. *Tiburon*, 447 U. S. 255, 260 (1980), where we stated that the application of land-use regulations to a particular piece of property is a taking only "if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." Moreover, we have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. See *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, 452

U. S. 264, 293–297 (1981). The reasons are obvious. A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

If neither the imposition of the permit requirement itself nor the denial of a permit necessarily constitutes a taking, it follows that the Court of Appeals erred in concluding that a narrow reading of the Corps' regulatory jurisdiction over wetlands was "necessary" to avoid "a serious taking problem." 729 F. 2d, at 398.[4] We have held that, in general, "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law,

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[4] Even were the Court of Appeals correct in concluding that a narrowing construction of the regulation is necessary to avoid takings of property through the application of the permit requirement, the construction adopted—which requires a showing of frequent flooding before property may be classified as a wetland—is hardly tailored to the supposed difficulty. Whether the denial of a permit would constitute a taking in any given case would depend upon the effect of the denial on the owner's ability to put the property to productive use. Whether the property was frequently flooded would have no particular bearing on this question, for overbroad regulation of even completely submerged property may constitute a taking. See, *e. g.*, *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979). Indeed, it may be more likely that denying a permit to fill frequently flooded property will prevent economically viable use of the property than denying a permit to fill property that is wet but not flooded. Of course, by excluding a large chunk of the Nation's wetlands from the regulatory definition, the Court of Appeals' construction might tend to limit the gross number of takings that the permit program would otherwise entail; but the construction adopted still bears an insufficiently precise relationship with the problem it seeks to avoid.

when a suit for compensation can be brought against the sovereign subsequent to a taking." *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1016 (1984) (footnote omitted). This maxim rests on the principle that so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional. *Williamson County*, *supra*, at 194–195. For precisely the same reason, the possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where a taking has occurred. Under such circumstances, adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty, cf. *Ashwander* v. *TVA*, 297 U. S. 288, 341–356 (1936) (Brandeis, J., concurring); it merely frustrates permissible applications of a statute or regulation.[5] Because the Tucker Act, 28 U. S. C. § 1491, which presumptively supplies a means of obtaining compensation for any taking that may occur through the operation of a federal statute, see *Ruckelshaus* v. *Monsanto Co.*, *supra*, at 1017, is available to provide compensation for takings that may result from the Corps' exercise of jurisdiction over wetlands, the Court of Appeals' fears that application of the Corps' permit program might result in a taking did not justify the court in adopting a

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[5] *United States* v. *Security Industrial Bank*, 459 U. S. 70 (1982), in which we adopted a narrowing construction of a statute to avoid a taking difficulty, is not to the contrary. In that case, the problem was that there was a substantial argument that retroactive application of a particular provision of the Bankruptcy Code would in every case constitute a taking; the solution was to avoid the difficulty by construing the statute to apply only prospectively. Such an approach is sensible where it appears that there is an identifiable class of cases in which application of a statute will necessarily constitute a taking. As we have observed, this is not such a case: there is no identifiable set of instances in which mere application of the permit requirement will necessarily or even probably constitute a taking. The approach of adopting a limiting construction is thus unwarranted.

more limited view of the Corps' authority than the terms of the relevant regulation might otherwise support.[6]

III

Purged of its spurious constitutional overtones, the question whether the regulation at issue requires respondent to obtain a permit before filling its property is an easy one. The regulation extends the Corps' authority under § 404 to all wetlands adjacent to navigable or interstate waters and their tributaries. Wetlands, in turn, are defined as lands that are "inundated *or saturated* by surface *or ground water* at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 CFR § 323.2(c) (1985) (emphasis added). The plain language of the regulation refutes the Court of Appeals' conclusion that inundation or "frequent flooding" by the adjacent body of water is a *sine qua non* of a wetland under the regulation. Indeed, the regulation could hardly state more clearly that saturation by either surface or ground water is sufficient to bring an area within the category of wetlands, provided that

[6] Because the Corps has now denied respondent a permit to fill its property, respondent may well have a ripe claim that a taking has occurred. On the record before us, however, we have no basis for evaluating this claim, because no evidence has been introduced that bears on the question of the extent to which denial of a permit to fill this property will prevent economically viable uses of the property or frustrate reasonable investment-backed expectations. In any event, this lawsuit is not the proper forum for resolving such a dispute: if the Corps has indeed effectively taken respondent's property, respondent's proper course is not to resist the Corps' suit for enforcement by denying that the regulation covers the property, but to initiate a suit for compensation in the Claims Court. In so stating, of course, we do not rule that respondent will be entitled to compensation for any temporary denial of use of its property should the Corps ultimately relent and allow it to be filled. We have not yet resolved the question whether compensation is a constitutionally mandated remedy for "temporary regulatory takings," see *Williamson County Planning Comm'n* v. *Hamilton Bank*, 473 U. S. 172 (1985), and this case provides no occasion for deciding the issue.

the saturation is sufficient to and does support wetland vegetation.

The history of the regulation underscores the absence of any requirement of inundation. The interim final regulation that the current regulation replaced explicitly included a requirement of "periodi[c] inundation." 33 CFR § 209.120–(d)(2)*(h)* (1976). In deleting the reference to "periodic inundation" from the regulation as finally promulgated, the Corps explained that it was repudiating the interpretation of that language "as requiring inundation over a record period of years." 42 Fed. Reg. 37128 (1977). In fashioning its own requirement of "frequent flooding" the Court of Appeals improperly reintroduced into the regulation precisely what the Corps had excised.[7]

Without the nonexistent requirement of frequent flooding, the regulatory definition of adjacent wetlands covers the property here. The District Court found that respondent's property was "characterized by the presence of vegetation that requires saturated soil conditions for growth and re-

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[7] The Court of Appeals seems also to have rested its frequent-flooding requirement on the language in the regulation stating that wetlands encompass those areas that "under normal circumstances do support" aquatic or semiaquatic vegetation. In the preamble to the final regulation, the Corps explained that this language was intended in part to exclude areas characterized by the "abnormal presence of aquatic vegetation in a non-aquatic area." 42 Fed. Reg. 37128 (1977). Apparently, the Court of Appeals concluded that the growth of wetlands vegetation in soils saturated by ground water rather than flooded by waters emanating from an adjacent navigable water or its tributaries was "abnormal" within the meaning of the preamble. This interpretation is untenable in light of the explicit statements in both the regulation and its preamble that areas saturated by ground water can fall within the category of wetlands. It would be nonsensical for the Corps to define wetlands to include such areas and then in the same sentence exclude them on the ground that the presence of wetland vegetation in such areas was abnormal. Evidently, the Corps had something else in mind when it referred to "abnormal" growth of wetlands vegetation—namely, the aberrational presence of such vegetation in dry, upland areas.

production," App. to Pet. for Cert. 24a, and that the source of the saturated soil conditions on the property was ground water. There is no plausible suggestion that these findings are clearly erroneous, and they plainly bring the property within the category of wetlands as defined by the current regulation. In addition, the court found that the wetland located on respondent's property was adjacent to a body of navigable water, since the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property to Black Creek, a navigable waterway. Again, the court's finding is not clearly erroneous. Together, these findings establish that respondent's property is a wetland adjacent to a navigable waterway. Hence, it is part of the "waters of the United States" as defined by 33 CFR § 323.2 (1985), and if the regulation itself is valid as a construction of the term "waters of the United States" as used in the Clean Water Act, a question which we now address, the property falls within the scope of the Corps' jurisdiction over "navigable waters" under § 404 of the Act.

IV

A

An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. *Chemical Manufacturers Assn.* v. *Natural Resources Defense Council, Inc.*, 470 U. S. 116, 125 (1985); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984). Accordingly, our review is limited to the question whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as "waters."[8]

[8] We are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adja-

On a purely linguistic level, it may appear unreasonable to classify "lands," wet or otherwise, as "waters." Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under § 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat. In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.

Faced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority. Neither of these sources provides unambiguous guidance for the Corps in this case, but together they do support the reasonableness of the Corps' approach of defining adjacent wetlands as "waters" within the meaning of § 404(a). Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a comprehensive legislative attempt "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101, 33 U. S. C. § 1251. This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, "the word 'integrity' . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained." H. R. Rep. No. 92–911, p. 76 (1972). Protection of aquatic ecosystems, Congress recog-

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cent to bodies of open water, see 33 CFR §§ 323.2(a)(2) and (3) (1985), and we do not express any opinion on that question.

nized, demanded broad federal authority to control pollution, for "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92–414, p. 77 (1972).

In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into "navigable waters," see CWA §§ 301(a), 404(a), 502(12), 33 U. S. C. §§ 1311(a), 1344(a), 1362(12), the Act's definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term. See S. Conf. Rep. No. 92–1236, p. 144 (1972); 118 Cong. Rec. 33756–33757 (1972) (statement of Rep. Dingell).

Of course, it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional tests of navigability; it is another to assert that Congress intended to abandon traditional notions of "waters" and include in that term "wetlands" as well. Nonetheless, the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term "waters" to encompass wetlands adjacent to waters as more conventionally defined. Following the lead of the Environmental Protection Agency, see 38 Fed. Reg. 10834 (1973), the Corps has determined that wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality:

> "The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system.

> Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system.
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> "For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system." 42 Fed. Reg. 37128 (1977).

We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the "waters" of the United States—based as it is on the Corps' and EPA's technical expertise—is unreasonable. In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.

This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water. The Corps has concluded that wetlands may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands. For example, wetlands that are not flooded by adjacent waters may still tend to drain into those waters. In such circumstances, the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, see 33 CFR § 320.4(b)(2)(vii) (1985), and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion, see §§ 320.4(b)(2)(iv) and (v). In addition, adjacent wetlands may "serve significant natural biological functions, including food chain production, general habitat, and nesting,

spawning, rearing and resting sites for aquatic . . . species." § 320.4(b)(2)(i). In short, the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water. Again, we cannot say that the Corps' judgment on these matters is unreasonable, and we therefore conclude that a definition of "waters of the United States" encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act. Because respondent's property is part of a wetland that actually abuts on a navigable waterway, respondent was required to have a permit in this case.[9]

B

Following promulgation of the Corps' interim final regulations in 1975, the Corps' assertion of authority under § 404 over waters not actually navigable engendered some congressional opposition. The controversy came to a head during Congress' consideration of the Clean Water Act of 1977, a major piece of legislation aimed at achieving "interim improvements within the existing framework" of the Clean Water Act. H. R. Rep. No. 95–139, pp. 1–2 (1977). In the

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[9] Of course, it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit. See 33 CFR § 320.4(b)(4) (1985).

end, however, as we shall explain, Congress acquiesced in the administrative construction.

Critics of the Corps' permit program attempted to insert limitations on the Corps' § 404 jurisdiction into the 1977 legislation: the House bill as reported out of committee proposed a redefinition of "navigable waters" that would have limited the Corps' authority under § 404 to waters navigable in fact and their adjacent wetlands (defined as wetlands periodically inundated by contiguous navigable waters). H. R. 3199, 95th Cong., 1st Sess., § 16 (1977). The bill reported by the Senate Committee on Environment and Public Works, by contrast, contained no redefinition of the scope of the "navigable waters" covered by § 404, and dealt with the perceived problem of overregulation by the Corps by exempting certain activities (primarily agricultural) from the permit requirement and by providing for assumption of some of the Corps' regulatory duties by federally approved state programs. S. 1952, 95th Cong., 1st Sess., § 49(b) (1977). On the floor of the Senate, however, an amendment was proposed limiting the scope of "navigable waters" along the lines set forth in the House bill. 123 Cong. Rec. 26710–26711 (1977).

In both Chambers, debate on the proposals to narrow the definition of navigable waters centered largely on the issue of wetlands preservation. See *id.*, at 10426–10432 (House debate); *id.*, at 26710–26729 (Senate debate). Proponents of a more limited § 404 jurisdiction contended that the Corps' assertion of jurisdiction over wetlands and other nonnavigable "waters" had far exceeded what Congress had intended in enacting § 404. Opponents of the proposed changes argued that a narrower definition of "navigable waters" for purposes of § 404 would exclude vast stretches of crucial wetlands from the Corps' jurisdiction, with detrimental effects on wetlands ecosystems, water quality, and the aquatic environment generally. The debate, particularly in the Senate, was lengthy. In the House, the debate ended with the adoption of a narrowed definition of "waters"; but in the Senate the limiting

amendment was defeated and the old definition retained. The Conference Committee adopted the Senate's approach: efforts to narrow the definition of "waters" were abandoned; the legislation as ultimately passed, in the words of Senator Baker, "retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act."[10]

The significance of Congress' treatment of the Corps' § 404 jurisdiction in its consideration of the Clean Water Act of 1977 is twofold. First, the scope of the Corps' asserted jurisdiction over wetlands was specifically brought to Congress' attention, and Congress rejected measures designed to curb the Corps' jurisdiction in large part because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of "navigable waters." Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it. See *Bob Jones University* v. *United States*, 461 U. S. 574, 599–601 (1983); *United States* v. *Rutherford*, 442 U. S. 544, 554, and n. 10 (1979).

Second, it is notable that even those who would have restricted the reach of the Corps' jurisdiction would have done so not by removing wetlands altogether from the definition of "waters of the United States," but only by restricting the scope of "navigable waters" under § 404 to waters navigable in fact *and their adjacent wetlands*. In amending the definition of "navigable waters" for purposes of § 404 only, the backers of the House bill would have left intact the existing definition of "navigable waters" for purposes of § 301 of the

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[10] 123 Cong. Rec. 39209 (1977); see also *id.*, at 39210 (statement of Sen. Wallop); *id.*, at 39196 (statement of Sen. Randolph); *id.*, at 38950 (statement of Rep. Murphy); *id.*, at 38994 (statement of Rep. Ambro).

Act, which generally prohibits discharges of pollutants into navigable waters. As the House Report explained: "'Navigable waters' as used in section 301 includes all of the waters of the United States including their adjacent wetlands." H. R. Rep. No. 95–139, p. 24 (1977). Thus, even those who thought that the Corps' existing authority under § 404 was too broad recognized (1) that the definition of "navigable waters" then in force for both § 301 and § 404 was reasonably interpreted to include adjacent wetlands, (2) that the water quality concerns of the Clean Water Act demanded regulation of at least some discharges into wetlands, and (3) that whatever jurisdiction the Corps would retain over discharges of fill material after passage of the 1977 legislation should extend to discharges into wetlands adjacent to any waters over which the Corps retained jurisdiction. These views provide additional support for a conclusion that Congress in 1977 acquiesced in the Corps' definition of waters as including adjacent wetlands.

Two features actually included in the legislation that Congress enacted in 1977 also support the view that the Act authorizes the Corps to regulate discharges into wetlands. First, in amending § 404 to allow federally approved state permit programs to supplant regulation by the Corps of certain discharges of fill material, Congress provided that the States would not be permitted to supersede the Corps' jurisdiction to regulate discharges into actually navigable waters and waters subject to the ebb and flow of the tide, "including wetlands adjacent thereto." CWA § 404(g)(1), 33 U. S. C. § 1344(g)(1). Here, then, Congress expressly stated that the term "waters" included adjacent wetlands.[11] Second, the

[11] To be sure, § 404(g)(1) does not conclusively determine the construction to be placed on the use of the term "waters" elsewhere in the Act (particularly in § 502(7), which contains the relevant definition of "navigable waters"); however, in light of the fact that the various provisions of the Act should be read *in pari materia*, it does at least suggest strongly that the term "waters" as used in the Act does not necessarily exclude "wetlands."

1977 Act authorized an appropriation of $6 million for completion by the Department of Interior of a "National Wetlands Inventory" to assist the States "in the development and operation of programs under this Act." CWA § 208(i)(2), 33 U. S. C. § 1288(i)(2). The enactment of this provision reflects congressional recognition that wetlands are a concern of the Clean Water Act and supports the conclusion that in defining the waters covered by the Act to include wetlands, the Corps is "implementing congressional policy rather than embarking on a frolic of its own." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 375 (1969).

C

We are thus persuaded that the language, policies, and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the "waters of the United States." The regulation in which the Corps has embodied this interpretation by its terms includes the wetlands on respondent's property within the class of waters that may not be filled without a permit; and, as we have seen, there is no reason to interpret the regulation more narrowly than its terms would indicate. Accordingly, the judgment of the Court of Appeals is

Reversed.

THOMAS *v.* ARN, SUPERINTENDENT, OHIO REFORMATORY FOR WOMEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84–5630. Argued October 7, 1985—Decided December 4, 1985

Petitioner was convicted of homicide in an Ohio court, and ultimately the Ohio Supreme Court upheld the conviction. She sought habeas corpus relief in the Federal District Court, which referred the case to a Magistrate, who issued a report recommending denial of the writ and containing proposed findings and conclusions of law and a notice that failure to file objections within 10 days waived the right to appeal the District Court's order. Petitioner failed to file objections even though she had received an extension of time to do so, but the District Judge *sua sponte* reviewed the entire record *de novo* and dismissed the petition on the merits. On appeal, petitioner provided no explanation for her failure to object to the Magistrate's report. Without reaching the merits, the Court of Appeals affirmed, holding that petitioner had waived the right to appeal by failing to file objections to the Magistrate's report.

Held: A court of appeals may adopt a rule conditioning appeal, when taken from a district court judgment that adopts a magistrate's recommendation, upon the filing of objections with the district court identifying those issues on which further review is desired. Such a rule, at least when (as here) it incorporates clear notice to the litigants and an opportunity to seek an extension of time for filing objections, is a valid exercise of the court's supervisory power that does not violate either the Federal Magistrates Act or the Constitution. Pp. 145–155.

(a) Here, the Court of Appeals intended to adopt a rule of procedure in the exercise of its supervisory power. Neither the intent nor the practical effect of the court's waiver rule is to restrict the court's own jurisdiction. Pp. 145–146.

(b) The courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation. The fact that the Sixth Circuit has deemed petitioner to have forfeited her statutory right to an appeal is not enough, standing alone, to invalidate the court's exercise of its supervisory power. Moreover, the Sixth Circuit's decision to require the filing of objections is supported by sound considerations of judicial economy. Pp. 146–148.

(c) Neither the language nor the legislative history of the Federal Magistrates Act—which provides that a litigant "may" file objections to

the magistrate's report within 10 days and thus obtain *de novo* review by the district judge, 28 U. S. C. § 636(b)(1)(C)—supports petitioner's argument that the Act precludes the waiver rule adopted by the Sixth Circuit. The Act does not require that the district court review the magistrate's report under some lesser standard than *de novo* review when no objection is filed. Nor does the obligatory filing of objections under the Act extend only to findings of fact and not to the magistrate's conclusions of law. Moreover, the waiver of appellate review is not inconsistent with the Act's purposes. Pp. 148–153.

(d) The waiver of appellate review does not violate Article III of the Constitution. Although a magistrate is not an Article III judge, a district court may refer dispositive motions to a magistrate for a recommendation so long as the entire process takes place under the district court's control and jurisdiction, and the judge exercises the ultimate authority to issue an appropriate order. The waiver of appellate review does not implicate Article III, because it is the district court, not the court of appeals, that must exercise supervision over the magistrate, and the waiver rule does not elevate the magistrate from an adjunct to the functional equivalent of an Article III judge. Nor does the waiver rule violate the Due Process Clause of the Fifth Amendment. Petitioner's statutory right of appeal was not denied; it was merely conditioned upon the filing of a piece of paper. Pp. 153–155.

728 F. 2d 813, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 156. STEVENS, J., filed a dissenting opinion, *post*, p. 157.

Christopher D. Stanley argued the cause for petitioner. With him on the brief was *Louis A. Jacobs*.

Richard David Drake, Assistant Attorney General of Ohio, argued the cause for respondent. With him on the brief was *Anthony J. Celebrezze, Jr.*, Attorney General.

JUSTICE MARSHALL delivered the opinion of the Court.

In 1976, Congress amended § 101 of the Federal Magistrates Act, 28 U. S. C. § 636, to provide that a United States district judge may refer dispositive pretrial motions, and petitions for writ of habeas corpus, to a magistrate, who shall conduct appropriate proceedings and recommend dispo-

sitions. Pub. L. 94–577, 90 Stat. 2729.[1] The amendments also provide that any party that disagrees with the magistrate's recommendations "may serve and file written objections" to the magistrate's report, and thus obtain *de novo* review by the district judge.[2] The question presented is whether a court of appeals may exercise its supervisory powers to establish a rule that the failure to file objections to the magistrate's report waives the right to appeal the district court's judgment. We hold that it may.

I

Petitioner was convicted by an Ohio court in 1978 of fatally shooting her common-law husband during an argument.

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[1] Title 28 U. S. C. § 636(b)(1)(B) provides:

"[A] judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement."

The motions excepted in § 636(b)(1)(A), and included by reference in subparagraph (B), are motions

"for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action."

[2] Title 28 U. S. C. § 636(b)(1)(C) provides:

"[T]he magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

"Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions."

The evidence at trial showed that the victim was a violent man who had beaten petitioner on a number of occasions during the previous three years. Petitioner raised the issue of self-defense at trial, and sought to call two witnesses who would present expert testimony concerning the Battered Wife Syndrome. After conducting a *voir dire* of these witnesses in chambers, the trial court refused to admit the testimony, on the grounds that the jury did not need the assistance of expert testimony to understand the case and that the witnesses, who had not personally examined petitioner, could not testify about her state of mind at the time of the shooting.

The Court of Appeals of Cuyahoga County reversed. *State* v. *Thomas*, 64 Ohio App. 2d 141, 411 N. E. 2d 845 (1979). The court's syllabus[3] concluded that testimony concerning the Battered Wife Syndrome is admissible "to afford the jury an understanding of the defendant's state of mind at the time she committed the homicide." App. 9. The Ohio Supreme Court, on discretionary review, reversed. *State* v. *Thomas*, 66 Ohio St. 2d 518, 423 N. E. 2d 137 (1981). The court held that the testimony was irrelevant to the issue of self-defense, and that its prejudicial effect would outweigh its probative value. Having exhausted state remedies, petitioner sought habeas corpus relief in the United States District Court for the Northern District of Ohio. The petition raised, *inter alia*, the question whether petitioner was denied a fair trial by the trial court's refusal to admit testimony concerning the Battered Wife Syndrome. Petitioner filed a memorandum of law in support of the petition. The District Judge, acting pursuant to 28 U. S. C. § 636(b)(1)(B), referred the case, including petitioner's memorandum of law, to a Magistrate. The Magistrate did not hold a hearing. On May 11, 1982, the Magistrate issued his report, containing proposed findings of fact and conclusions of law and recom-

[3] In Ohio, the court's syllabus contains the controlling law. See *Engle* v. *Isaac*, 456 U. S. 107, 111, n. 3 (1982), citing *Haas* v. *State*, 103 Ohio St. 1, 7–8, 132 N. E. 158, 159–160 (1921).

mending that the writ be denied. On the issue of the Battered Wife Syndrome testimony, the Magistrate concluded that the trial court's failure to admit the proffered testimony had not impaired the fundamental fairness of the trial, and therefore was not an adequate ground for habeas corpus relief.

The last page of the Magistrate's report contained the prominent legend:

> "ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. See: *United States* v. *Walters*, 638 F. 2d 947 (6th Cir. 1981)."

Despite this clear notice, petitioner failed to file objections at any time. She sought and received an extension of time to file objections through June 15, 1982, on the grounds that "this case entails many substantive issues and counsel needs more time to write his brief." However, petitioner made no further submissions on the merits to the District Court. Notwithstanding petitioner's failure to file objections, the District Judge *sua sponte* "review[ed] . . . the entire record *de novo*," App. 59, and dismissed the petition on the merits. Petitioner sought and was granted leave to appeal.

Petitioner's brief on appeal raised only the issue of the Battered Wife Syndrome testimony. The brief provided no explanation for petitioner's failure to object to the Magistrate's report. Counsel for petitioner waived oral argument, and the case was decided on the briefs. The Court of Appeals for the Sixth Circuit affirmed. 728 F. 2d 813 (1984). Without reaching the merits, it held that petitioner had waived the right to appeal by failing to file objections to the Magistrate's report. *Id.*, at 815. The court relied upon its prior decision in *United States* v. *Walters*, 638 F. 2d 947 (1981), which established the prospective rule that failure to file timely objections with the district court waives subsequent review in the

court of appeals. We granted the petition for a writ of certiorari, 470 U. S. 1027 (1985), and we now affirm.

II

In *United States* v. *Walters*, *supra*, the appellant failed to object to the Magistrate's report, and the District Court adopted that report as its disposition of the case. The appellant then brought an appeal. The Court of Appeals for the Sixth Circuit considered the threshold question whether the appellant's failure to apprise the District Court of its disagreement with the Magistrate's recommendation waived the right to appeal. The court held:

> "The permissive language of 28 U. S. C. § 636 suggests that a party's failure to file objections is not a waiver of appellate review. However, the fundamental congressional policy underlying the Magistrate's Act—to improve access to the federal courts and aid the efficient administration of justice—is best served by our holding that a party shall file objections with the district court or else waive right to appeal. Additionally, through the exercise of our supervisory power, we hold that a party shall be informed by the magistrate that objections must be filed within ten days or further appeal is waived.
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> . . . . .
>
> "However, we give our ruling only prospective effect because rules of procedure should promote, not defeat the ends of justice . . . ." *Id.*, at 949–950 (footnote and citations omitted).

The nature of the rule and its prospective application demonstrate that the court intended to adopt a "rul[e] of procedure," *id.*, at 950, in the exercise of its supervisory powers. Later opinions of the Sixth Circuit make it clear that the court views *Walters* in this way. See *Patterson* v. *Mintzes*, 717 F. 2d 284, 286 (1983) ("In *Walters* . . . this Court promulgated [a] rule of waiver"); *United States* v. *Martin*, 704 F. 2d 267, 275 (1983) (Jones, J., concurring) (characterizing *Wal-*

ters as "[r]ulemaking through the exercise of supervisory powers"). Thus, petitioner's first contention—that the Court of Appeals has refused to exercise the jurisdiction that Congress granted it—is simply inaccurate. The Court of Appeals expressly acknowledged that it had subject-matter jurisdiction over petitioner's appeal. 728 F. 2d, at 814. The Sixth Circuit has also shown that its rule is not jurisdictional by excusing the procedural default in a recent case. See *Patterson* v. *Mintzes*, *supra* (considering appeal on merits despite *pro se* litigant's late filing of objections). We therefore conclude that neither the intent nor the practical effect of the Sixth Circuit's waiver rule is to restrict the court's own jurisdiction.[4]

III

It cannot be doubted that the courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation. Cf. *Cuyler* v. *Sullivan*, 446 U. S. 335, 346, n. 10 (1980) (approving exercise of supervisory powers to require district court inquiry concerning joint representation of criminal defendants). Indeed, this Court has acknowledged the power of the courts of appeals to mandate "procedures deemed desirable from the viewpoint of sound judicial practice although

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[4]The First, Second, Fourth, and Fifth Circuits have adopted waiver rules similar to the Sixth Circuit rule at issue in the present case. See *Park Motor Mart, Inc.* v. *Ford Motor Co.*, 616 F. 2d 603 (CA1 1980); *McCarthy* v. *Manson*, 714 F. 2d 234, 237 (CA2 1983); *United States* v. *Schronce*, 727 F. 2d 91 (CA4), cert. denied, 467 U. S. 1208 (1984); *United States* v. *Lewis*, 621 F. 2d 1382, 1386 (CA5 1980), cert. denied, 450 U. S. 935 (1981). The Ninth and Eleventh Circuits have concluded that the failure to file objections waives only factual issues on the appeal. See *Britt* v. *Simi Valley Unified School District*, 708 F. 2d 452, 454 (CA9 1983) (order denying petition for rehearing); *Nettles* v. *Wainwright*, 677 F. 2d 404 (CA5 1982) (en banc); but see *Lorin Corp.* v. *Goto & Co.*, 700 F. 2d 1202, 1205–1207 (CA8 1983) (rejecting waiver rule, at least where parties had not been notified that failure to object would waive appeal). In none of these cases have the courts spoken in jurisdictional terms.

in nowise commanded by statute or by the Constitution." *Cupp* v. *Naughten*, 414 U. S. 141, 146 (1973); see also *Barker* v. *Wingo*, 407 U. S. 514, 530, n. 29 (1972).[5] Had petitioner failed to comply with a scheduling order or pay a filing fee established by a court of appeals, that court could certainly dismiss the appeal. Cf. *Link* v. *Wabash R. Co.*, 370 U. S. 626 (1962) (recognizing "inherent power" of court to dismiss case for want of prosecution). The fact that the Sixth Circuit has deemed petitioner to have forfeited her statutory right to an appeal is not enough, standing alone, to invalidate the court's exercise of its supervisory power.

The Sixth Circuit's decision to require the filing of objections is supported by sound considerations of judicial economy. The filing of objections to a magistrate's report enables the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute.[6] The Sixth Circuit's rule, by precluding appellate

[5] This power rests on the firmest ground when used to establish rules of judicial procedure. See Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L. Rev. 1433, 1465 (1984) (federal courts have inherent authority to regulate "technical details and policies intrinsic to the litigation process"). The Courts of Appeals have often exercised that authority. See, *e. g.*, *Tingler* v. *Marshall*, 716 F. 2d 1109, 1112 (CA6 1983) (establishing procedure for *sua sponte* dismissal of complaints); *United States* v. *Florea*, 541 F. 2d 568, 572 (CA6 1976) (prospective rule holding that contact between party's agent and juror is *per se* prejudicial), cert. denied, 430 U. S. 945 (1977); *United States* v. *Schiavo*, 504 F. 2d 1, 7–8 (CA3) (en banc) (establishing procedures for enjoining publication of information concerning criminal trial), cert. denied *sub nom. Ditter* v. *Philadelphia Newspapers, Inc.*, 419 U. S. 1096 (1974).

[6] In the present case, the filing of objections could have resulted in a considerable saving of judicial time. The original petition contained several grounds for relief, but on appeal petitioner raised only the issue of the admissibility of expert testimony on the Battered Wife Syndrome. Had petitioner objected only to that aspect of the Magistrate's report, the Magistrate's review would have served to narrow the dispute for the District Judge, and petitioner would have preserved her right to appeal the exclusion of her expert testimony.

review of any issue not contained in objections, prevents a litigant from "sandbagging" the district judge by failing to object and then appealing. Absent such a rule, any issue before the magistrate would be a proper subject for appellate review. This would either force the court of appeals to consider claims that were never reviewed by the district court, or force the district court to review every issue in every case, no matter how thorough the magistrate's analysis and even if both parties were satisfied with the magistrate's report. Either result would be an inefficient use of judicial resources. In short, "[t]he same rationale that prevents a party from raising an issue before a circuit court of appeals that was not raised before the district court applies here." *United States* v. *Schronce*, 727 F. 2d 91, 94 (CA4) (footnote omitted), cert. denied, 467 U. S. 1208 (1984).

IV

Even a sensible and efficient use of the supervisory power, however, is invalid if it conflicts with constitutional or statutory provisions. A contrary result "would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States* v. *Payner*, 447 U. S. 727, 737 (1980). Thus we now consider whether the Sixth Circuit's waiver rule conflicts with statutory law or with the Constitution.

A

Petitioner argues that the Federal Magistrates Act precludes the waiver rule adopted by the Sixth Circuit. Her argument focuses on the permissive nature of the statutory language. The statute provides that a litigant "may" file objections, and nowhere states that the failure to do so will waive an appeal. Petitioner cites the Eighth Circuit's conclusion that "[o]ne would think that if Congress had wished such a drastic consequence to follow from the missing of the ten-day time limit, it would have said so explicitly." *Lorin Corp.* v. *Goto & Co.*, 700 F. 2d 1202, 1206 (1983). However,

we need not decide whether the Act mandates a waiver of appellate review absent objections. We hold only that it does not forbid such a rule.

Section 636(b)(1)(C) provides that "[a] judge of the [district] court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." The statute does not on its face require any review at all, by either the district court or the court of appeals, of any issue that is not the subject of an objection. Petitioner argues, however, that the statutory language and purpose implicitly require the district court to review a magistrate's report even if no party objects. If petitioner's interpretation of the statute is correct, then the waiver of appellate review, as formulated by the Sixth and other Circuits, proceeds from an erroneous assumption—that the failure to object may constitute a procedural default waiving review even at the district court level.[7] Moreover, were the district judge required to review the magistrate's report in every case, the waiver of appellate review would not promote judicial economy as discussed in Part III, *supra*.

Petitioner first argues that a failure to object waives only *de novo* review, and that the district judge must still review the magistrate's report under some lesser standard. However, § 636(b)(1)(C) simply does not provide for such review. This omission does not seem to be inadvertent, because Congress provided for a "clearly erroneous or contrary to law" standard of review of a magistrate's disposition of certain pretrial matters in § 636(b)(1)(A). See *Park Motor Mart, Inc.* v. *Ford Motor Co.*, 616 F. 2d 603, 605 (CA1 1980). Nor

[7] The Sixth Circuit, in *Walters*, cited with approval the First Circuit's decision in *Park Motor Mart*, which held that "a party 'may' file objections within ten days or he may not, as he chooses, but he 'shall' do so if he wishes further consideration." 616 F. 2d, at 605; see *Walters*, 638 F. 2d, at 950. See also *McCarthy* v. *Manson*, 714 F. 2d, at 237 ("When a party fails to object timely to a magistrate's recommended decision, it waives any right to further judicial review of that decision") (footnote and citation omitted).

does petitioner point to anything in the legislative history of the 1976 amendments mandating review under some lesser standard. We are therefore not persuaded that the statute positively requires some lesser review by the district court when no objections are filed.

Petitioner also argues that, under the Act, the obligatory filing of objections extends only to findings of fact. She urges that Congress, in order to vest final authority over questions of law in an Article III judge, intended that the district judge would automatically review the magistrate's conclusions of law. We reject, however, petitioner's distinction between factual and legal issues. Once again, the plain language of the statute recognizes no such distinction.[8] We also fail to find such a requirement in the legislative history.

It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings. The House and Senate Reports accompanying the 1976 amendments do not expressly consider what sort of review the district court should perform when no party objects to the magistrate's report. See S. Rep. No. 94–625, pp. 9–10 (1976) (hereafter Senate Report); H. R. Rep. No. 94–1609, p. 11 (1976) (hereafter House Report). There is nothing in those Reports, however, that demonstrates an intent to require the district court to give any more consideration to the magistrate's report than the court considers appropriate.[9] Moreover, the Subcommittee

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[8] This is so even though the category of dispositive matters subject to *de novo* review by the district judge as of right only upon filing of objections includes motions for judgment on the pleadings and dismissal for failure to state a claim on which relief can be granted, which consist exclusively of issues of law. See n. 1, *supra*.

[9] Petitioner points to a passage in the House Report that quotes from *Campbell* v. *United States District Court*, 501 F. 2d 196, 206 (CA9), cert. denied, 419 U. S. 879 (1974). The Ninth Circuit concluded: "If neither party contests the magistrate's proposed findings of fact, the court may assume their correctness and decide the motion on the applicable law." See

that drafted and held hearings on the 1976 amendments had before it the guidelines of the Administrative Office of the United States Courts concerning the efficient use of magistrates. Those guidelines recommended to the district courts that "[w]here a magistrate makes a finding *or ruling* on a motion or an issue, his determination should become that of the district court, unless specific objection is filed within a reasonable time." See Jurisdiction of United States Magistrates, Hearings on S. 1283 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 24 (1975) (emphasis added) (hereafter Senate Hearings). The Committee also heard Judge Metzner of the Southern District of New York, the chairman of a Judicial Conference Committee on the administration of the magistrate system, testify that he personally followed that practice. See *id.*, at 11 ("If any objections come in, . . . I review [the record] and decide it. If no objections come in, I merely sign the magistrate's order").[10] The

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House Report, at 3. However, that statement was part of a longer quotation setting a *de novo* review standard when objections are filed. The House Report stated that a House amendment, which called for *de novo* review in the same circumstances, was "adopted" from the Ninth Circuit's decision in *Campbell*. House Report, at 3. We believe, therefore, that the House Report used the language from *Campbell* only to support a *de novo* standard upon the filing of objections, and not for any other proposition.

[10] Indeed, Judge Metzner specifically addressed the difference between a magistrate's ruling on a nondispositive motion, which Congress clearly "intended to be 'final' unless a judge of the court exercises his ultimate authority to reconsider the magistrate's determination," Senate Report, at 8, and a ruling on a dispositive motion. Judge Metzner concluded: "I think we are talking more about form, than we are of substance." Senate Hearings, at 12.

Moreover, both Judge Metzner and the Judicial Conference were of the opinion that Congress could probably vest magistrates with the authority to make a final decision on dispositive motions without violating Article III, and that the language of § 636(b)(1)(B), calling for the magistrate to make only recommendations on dispositive motions, was adopted out of an abundance of caution. See Senate Hearings, at 6 (statement of

Judicial Conference of the United States, which supported the *de novo* standard of review eventually incorporated in § 636(b)(1)(C), opined that in most instances no party would object to the magistrate's recommendation, and the litigation would terminate with the judge's adoption of the magistrate's report. See Senate Hearings, at 35, 37. Congress apparently assumed, therefore, that any party who was dissatisfied for any reason with the magistrate's report would file objections, and those objections would trigger district court review.[11] There is no indication that Congress, in enacting § 636(b)(1)(C), intended to require a district judge to review a magistrate's report to which no objections are filed. It did not preclude treating the failure to object as a procedural default, waiving the right to further consideration of any sort. We thus find nothing in the statute or the legislative history that convinces us that Congress intended to forbid a rule such as the one adopted by the Sixth Circuit.

Nor is the waiver of appellate review inconsistent with the purposes of the Act. The Act grew out of Congress' desire to give district judges "additional assistance" in dealing with a caseload that was increasing far more rapidly than the number of judgeships. *Mathews* v. *Weber*, 423 U. S. 261, 268 (1976).[12] Congress did not intend district judges "to devote a

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Judge Metzner); *id.*, at 35 (report of Judicial Conference of the United States). While we express no view on the accuracy of those opinions, we think they are relevant to Congress' intent. See also House Report, at 8 ("it is not feasible for every judicial act, at every stage of the proceeding, to be performed by 'a judge of the court'").

[11] See Senate Hearings, at 32 (statement of William P. Westphal, Chief Counsel) (filing objections as provided in the statute "is the procedure for them to follow, if they feel aggrieved by any of these motions").

[12] The 1976 amendments were prompted by this Court's decision in *Wingo* v. *Wedding*, 418 U. S. 461 (1974). That case held that Congress had not intended, in enacting the Federal Magistrates Act in 1968, to permit a magistrate to conduct an evidentiary hearing on a habeas corpus petition. Congress enacted the 1976 amendments to "restat[e] and clarif[y]" Congress' intent to permit magistrates to hold evidentiary hearings and perform other judicial functions. See Senate Report, at 3.

substantial portion of their available time to various procedural steps rather than to the trial itself." House Report, at 7. Nor does the legislative history indicate that Congress intended this task merely to be transferred to the court of appeals. It seems clear that Congress would not have wanted district judges to devote time to reviewing magistrate's reports except to the extent that such review is requested by the parties or otherwise necessitated by Article III of the Constitution. We now turn to the latter question.

B

Petitioner contends that the waiver of appellate review violates Article III and the Due Process Clause of the Fifth Amendment. Article III vests the judicial power of the United States in judges who have life tenure and protection from decreases in salary.[13] Although a magistrate is not an Article III judge, this Court has held that a district court may refer dispositive motions to a magistrate for a recommendation so long as "the entire process takes place under the district court's total control and jurisdiction," *United States* v. *Raddatz*, 447 U. S. 667, 681 (1980), and the judge "'exercise[s] the ultimate authority to issue an appropriate order,'" *id.*, at 682, quoting Senate Report, at 3. The Sixth Circuit's rule, as petitioner sees it, permits a magistrate to exercise the Article III judicial power, because the rule forecloses meaningful review of a magistrate's report at both the district and appellate levels if no objections are filed.

We find that argument untenable. The waiver of appellate review does not implicate Article III, because it is the

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[13] Article III, § 1, of the Constitution provides:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

district court, not the court of appeals, that must exercise supervision over the magistrate. Even assuming, however, that the effect of the Sixth Circuit's rule is to permit both the district judge and the court of appeals to refuse to review a magistrate's report absent timely objection, we do not believe that the rule elevates the magistrate from an adjunct to the functional equivalent of an Article III judge. The rule merely establishes a procedural default that has no effect on the magistrate's or the court's jurisdiction. The district judge has jurisdiction over the case at all times. He retains full authority to decide whether to refer a case to the magistrate, to review the magistrate's report, and to enter judgment. Any party that desires plenary consideration by the Article III judge of any issue need only ask. Moreover, while the statute does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, *sua sponte* or at the request of a party, under a *de novo* or any other standard. Indeed, in the present case, the District Judge made a *de novo* determination of the petition despite petitioner's failure even to suggest that the Magistrate erred. The Sixth Circuit's rule, therefore, has not removed "'the essential attributes of the judicial power,'" *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 77 (1982) (plurality opinion), quoting *Crowell* v. *Benson*, 285 U. S. 22, 51 (1932), from the Article III tribunal.[14]

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[14] The plurality in *Northern Pipeline*, and the concurrence in *Raddatz*, noted that the magistrate himself remains under the district court's authority. The magistrate is appointed, and subject to removal, by the district court. See *Northern Pipeline*, 458 U. S., at 79, and n. 30; *Raddatz*, 447 U. S., at 685 (BLACKMUN, J., concurring) ("[T]he only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without, the judicial department"). Those observations, of course, are also relevant here, and again weigh on the side of concluding that a magistrate remains an adjunct even though the district court and the court of appeals may refuse to entertain issues that are not raised in properly filed objections.

Petitioner claims also that she was denied her statutory right of appeal, in violation of the Due Process Clause. That right was not denied, however; it was merely conditioned upon the filing of a piece of paper. Petitioner was notified in unambiguous terms of the consequences of a failure to file, and deliberately failed to file nevertheless. We recently reiterated our longstanding maxim that "the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 437 (1982). The same rationale applies to the forfeiture of an appeal, and we believe that the Sixth Circuit's rule is reasonable. Litigants subject to the Sixth Circuit's rule are afforded "'an *opportunity* . . . granted at a meaningful time and in a meaningful manner,'" *ibid.*, quoting *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965), to obtain a hearing by the Court of Appeals. We also emphasize that, because the rule is a nonjurisdictional waiver provision, the Court of Appeals may excuse the default in the interests of justice.[15]

V

We hold that a court of appeals may adopt a rule conditioning appeal, when taken from a district court judgment that adopts a magistrate's recommendation, upon the filing of objections with the district court identifying those issues on which further review is desired. Such a rule, at least when it incorporates clear notice to the litigants and an opportunity to seek an extension of time for filing objections, is a valid exercise of the supervisory power that does not violate either the Federal Magistrates Act or the Constitution. The judgment of the Court of Appeals is

Affirmed.

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[15] Cf. Fed. Rule Crim. Proc. 52(b) (court may correct plain error despite failure of party to object). We need not decide at this time what standards the courts of appeals must apply in considering exceptions to their waiver rules.

JUSTICE BRENNAN, with whom JUSTICE BLACKMUN joins, dissenting.

Under the rule adopted by the United States Court of Appeals for the Sixth Circuit and sanctioned by this Court, a party waives his right to appeal the judgment of the district court by failing to file timely objections to a magistrate's report. Because this rule conflicts with the plain language of the Federal Magistrate's Act, I dissent.

The Magistrate's Act states that "any party may serve and file written objections to [the magistrate's] proposed findings and recommendations. . . . A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U. S. C. §636(b)(1)(C). The Act clearly specifies the penalty for a party's failure to file objections to the magistrate's report—the party loses his right to *de novo* review by the district court. The Act does not *require* a party to file objections. And it does not, contrary to the Sixth Circuit's rule, provide that a party's failure to file objections deprives him of the right to *any* review by the district court,* or by the court of appeals. Rather, the district court judge retains the power, and indeed the obligation, to "accept, reject, or modify" the magistrate's findings and recommendations. 28 U. S. C. §636(b)(1)(C). The Act leaves unaffected a party's right to appeal the judgment of the district court to the court of appeals.

A habeas applicant is entitled to appeal only the final order of the district court. 28 U. S. C. §2253. I fail to understand how petitioner could have waived her right to appeal a final order *before* that order was rendered. The majority attempts to justify this result by characterizing the Sixth Circuit's rule as a simple exercise of its supervisory powers.

*The absence of an objection cannot "reliev[e] the district court of its obligation to act judicially, to decide for itself whether the Magistrate's report is correct." *Lorin Corp.* v. *Goto & Co.*, 700 F. 2d 1202, 1206 (CA8 1983).

While I do not question the Court of Appeals' authority to promulgate reasonable procedural rules, I would not sanction a rule that imposes a penalty for failure to file objections beyond that contemplated by Congress. Because the Sixth Circuit's "supervisory rule" unlawfully deprives petitioner of her statutory right to appeal the District Court's judgment, I respectfully dissent.

JUSTICE STEVENS, dissenting.

The waiver rule adopted by the United States Court of Appeals for the Sixth Circuit is neither required nor prohibited by the Federal Magistrates Act. As a product of that court's supervisory power, it need not conform to the practice followed in other circuits. Hence, despite the appearance of a conflict among the circuits, the interest in uniform interpretation of federal law is not implicated and this Court might have been well advised simply to deny the petition for certiorari. Since the Court has elected to review the application of the Sixth Circuit's rule, however, I believe it should modify it in one respect.

As the Court demonstrates, in most cases it is surely permissible to treat the failure to file timely objections to a magistrate's report as a waiver of the right to review, not only in the district court, but in the court of appeals as well. But our precedents often recognize an exception to waiver rules—namely, when a reviewing court decides the merits of an issue even though a procedural default relieved it of the duty to do so. See, *e. g.*, *Oklahoma City* v. *Tuttle*, 471 U. S. 800, 815–816 (1985) (reaching merits despite failure to object to jury instruction because Court of Appeals overlooked default); *On Lee* v. *United States*, 343 U. S. 747, 750, n. 3 (1952) ("Though we think the Court of Appeals would have been within its discretion in refusing to consider the point, their having passed on it leads us to treat the merits also"). It is for this reason that we may disregard a procedural default in a state trial court if a state appellate court addresses the federal issue. *E. g.*, *Ulster County Court* v.

Allen, 442 U. S. 140, 149 (1979); *Raley* v. *Ohio*, 360 U. S. 423, 436–437 (1959). In such cases, the reasons for relying on the procedural default as a bar to further review are generally, if not always, outweighed by the interest in having the merits of the issue correctly resolved.

A similar exception should be recognized in this case. When the district court elects to exercise its power to review a magistrate's report *de novo* and renders an opinion resolving an issue on the merits, there is no danger of "sandbagging" the district judge. See *ante*, at 148. Moreover, if the district judge has concluded that there is enough merit in a claim to warrant careful consideration and explanation despite the litigant's failure to object before the magistrate, the interest in minimizing the risk of error should prevail over the interest in requiring strict compliance with procedural rules. Because the District Court decided the merits of petitioner's claim in this case, I would hold that she has a right to review in the Court of Appeals. To that admittedly limited extent, I respectfully dissent.

MAINE *v.* MOULTON

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

No. 84–786. Argued October 8, 1985—Decided December 10, 1985

Respondent, represented by retained counsel, pleaded not guilty in a Maine Superior Court to charges of theft by receiving of automotive vehicles and parts. Respondent's codefendant Colson informed the police that he had received anonymous threatening telephone calls regarding the pending charges and indicated that he wished to talk to the police about the charges. Before meeting with the police, Colson met with respondent to plan for the upcoming trial, and, according to Colson, respondent suggested the possibility of killing a State's witness. Thereafter, Colson and his lawyer met with police officers, and Colson confessed to his participation with respondent in committing the crimes for which they had been indicted and agreed to testify against respondent and cooperate in the prosecution of respondent on the pending charges if no further charges were brought against Colson. Colson also consented to have a recording device placed on his telephone, and agreed to record any anonymous threats or any calls from respondent. Having learned from recorded telephone calls that Colson and respondent were going to meet to plan defense strategy for the upcoming trial, the police obtained Colson's consent to be equipped with a body wire transmitter to record the meeting. Although Colson was instructed not to attempt to question respondent at the meeting, his remarks in fact caused respondent to make incriminating statements. The trial court denied respondent's pretrial motion to suppress the recorded statements he made to Colson as having been obtained in violation of respondent's right to the assistance of counsel under the Sixth and Fourteenth Amendments on the ground that the recordings were made for other reasons. Some of respondent's recorded incriminating statements made at the meeting with Colson were admitted in evidence, and respondent was convicted of some of the charges. The Supreme Judicial Court of Maine reversed and remanded for a new trial.

Held: Respondent's Sixth Amendment right to the assistance of counsel was violated by the admission at trial of incriminating statements made by him to Colson after indictment and at the meeting of the two to plan defense strategy for the upcoming trial. Pp. 168–180.

(a) The assistance of counsel is necessary to safeguard the other procedural safeguards provided to the accused by the criminal justice process. Accordingly, the right to the assistance of counsel is not limited to

participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. Whatever else it may mean, the right to counsel means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him. Pp. 168–170.

(b) Once the right to counsel has attached and been asserted, the State must honor it. At the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel. *Spano* v. *New York*, 360 U. S. 315; *Massiah* v. *United States*, 377 U. S. 201; *United States* v. *Henry*, 447 U. S. 264. Pp. 170–174.

(c) The State misreads *Massiah*, *supra*, and *Henry*, *supra*, in contending that the decisive fact in those cases was that the police set up the confrontation between the accused and a police agent at which incriminating statements were elicited, and that thus respondent's Sixth Amendment rights were not violated here because he rather than Colson initiated the recorded conversations. The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. Knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Pp. 174–176.

(d) In this case, the State clearly violated respondent's Sixth Amendment right when it arranged to record conversations between respondent and its undercover informant, Colson. When the police requested that Colson wear a body wire transmitter to the meeting with respondent, the police knew that respondent would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel. By concealing the fact that Colson was an agent of the State, the police denied respondent the opportunity to consult with counsel and thus denied him the assistance of counsel guaranteed by the Sixth Amendment. Pp. 176–177.

(e) There is no merit to the argument that the incriminating statements obtained by the police should not be suppressed because the police had other, legitimate reasons for listening to respondent's conversations with Colson, namely, to investigate respondent's alleged plan to kill the State's witness and to insure Colson's safety. This same argument was rejected in *Massiah*, *supra*, where the Court held that to allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert the need to investigate other crimes to justify their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the

evisceration of the Sixth Amendment right. Evidence obtained that is relevant to crimes as to which the Sixth Amendment right has not yet attached may be admissible at a trial on those charges. Pp. 178–180.

481 A. 2d 155, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined, and in Parts I and III of which O'CONNOR, J., joined, *post*, p. 181.

Wayne S. Moss, Assistant Attorney General of Maine, argued the cause for petitioner. With him on the briefs were *James E. Tierney*, Attorney General, and *Charles K. Leadbetter*, *James T. Kilbreth III*, and *Eric E. Wright*, Assistant Attorneys General.

Anthony W. Beardsley, by appointment of the Court, 470 U. S. 1082, argued the cause for respondent. With him on the brief were *David P. Cluchey* and *Charles S. Sims*.*

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether respondent's Sixth Amendment right to the assistance of counsel was violated by the admission at trial of incriminating statements made by him to his codefendant, a secret government informant, after indictment and at a meeting of the two to plan defense strategy for the upcoming trial.

I

On the night of January 15, 1981, police officers in Belfast, Maine, responded to a fire call in the vicinity of the Belfast Dodge automobile dealership. Arriving at the scene, the officers discovered a burning Chevrolet dump truck which they recognized as a vehicle that had been reported stolen.[1]

**Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey, Edwin S. Kneedler*, and *Kathleen A. Felton* filed a brief for the United States as *amicus curiae* urging reversal.

[1] Indeed, in pursuing an anonymous tip received earlier that day that the stolen truck could be found at Belfast Dodge, one of the officers had conducted a consent search of the main building of the dealership facility.

After examining the burning truck, the officers searched a building located on the Belfast Dodge property. This building was not part of the dealership, but was leased to respondent Perley Moulton and his codefendant Gary Colson who were using the space to restore and sell old Ford Mustangs. Inside, the officers discovered evidence of several recent automobile and automobile-related thefts.

On April 7, 1981, a Waldo County grand jury returned indictments charging Moulton and Colson with four counts of theft by receiving in violation of Me. Rev. Stat. Ann., Tit. 17–A, § 359 (1983). Specifically, the indictments alleged that Moulton and Colson received, retained, or disposed of a 1978 Ford pickup truck, a 1978 Chevrolet dump truck, a 1970 Ford Mustang automobile, and assorted Ford Motor Company automotive parts knowing these to be stolen and intending to deprive the owners of possession. On April 9, Moulton and Colson, represented by retained counsel, appeared before the Maine Superior Court for Waldo County and entered pleas of not guilty. Both were enlarged on bail pending trial. Numerous proceedings, unnecessary to detail here, occurred during the ensuing year and a half.

On November 4, 1982, Colson complained by telephone to Robert Keating, Chief of the Belfast Police Department, that he had received anonymous threatening telephone calls regarding the charges pending against him and Moulton, and indicated that he wished to talk to the police about the charges. Keating told Colson to speak with his lawyer and to call back.

On November 6, Colson met with Moulton at a Belfast restaurant to plan for their upcoming trial. According to Colson, Moulton suggested the possibility of killing Gary Elwell, a State's witness, and they discussed how to commit the murder.

On November 9 and 10, Colson, accompanied by his lawyer, met with Police Chief Keating and State Police Detective Rexford Kelley. At these meetings, Colson gave full

confessions of his participation with Moulton in committing the crimes for which they had been indicted. In addition, Colson admitted that he and Moulton had not merely received stolen automotive parts, but also had broken into the local Ford dealership to steal the parts. Colson also stated that he and Moulton had set fire to the dump truck and had committed other thefts. The officers offered Colson a deal: no further charges would be brought against him if he would testify against Moulton and otherwise cooperate in the prosecution of Moulton on the pending charges. Colson agreed to cooperate.[2]

Colson also discussed with Keating and Kelley the anonymous threats he had received and Moulton's inchoate plan to kill Gary Elwell. Keating requested, and Colson consented, to have a recording device placed on Colson's telephone. Colson was instructed to turn the recording device on whenever he received a telephone call, but to turn it off immediately unless it was a threat from the anonymous caller or a call from Moulton.

The recording device was on Colson's telephone for over a month. Although he received no threats, Colson spoke to Moulton three times during this period, and the tapes of these calls were turned over to the police. The first conversation, on November 22, concerned primarily personal matters. The only reference to the pending criminal charges was Colson's question whether Moulton had "heard anything from the lawyer," and Moulton's response that he had not, but that he had "come up with a method" that he "ha[d] to work out the details on," and that "[s]ome day [he'd] like to get together and talk to [Colson] about it." Moulton, then

[2] Seven months after the conclusion of Moulton's trial, Colson pleaded guilty to two counts of theft. The prosecutor recommended that Colson be sentenced to 2 years' imprisonment, all but 15 days to be suspended, and placed on probation for 2 years. Colson also agreed to make restitution up to $2,000 during the probationary period. The trial court accepted this recommendation and sentenced Colson accordingly.

living in New Hampshire, said that he was planning to visit Belfast around Christmas.

The second telephone conversation, on December 2, was prompted by Moulton's receipt of copies of statements of three of the State's witnesses, including Elwell; Colson had not yet received copies of the statements. Most of their talk (on Moulton's side particularly) was about the statements of Elwell and Elwell's brother, which accused Moulton and Colson of being guilty of the pending charges and which Moulton complained were an attempt to frame him and Colson. After reading Colson a statement by Elwell that he had received a threatening phone call, Moulton commented "[t]his is a big joke, man."[3] When Colson jokingly suggested that they flee to Acapulco, Moulton vehemently rejected the suggestion, stating: "No, I'm gonna stay here and I'm gonna fight it man. I'm gonna fight it man. I ain't gonna get framed for nothing." Colson assented to this and suggested, "we'll have to get together sometime . . . ." Moulton reminded Colson that he would be visiting at Christmas, and the conversation ended without Moulton having said anything that incriminated him.

The third telephone conversation, which took place on December 14, was similar to the second one. Most of the conversation concerned the pending charges, but Moulton said nothing inculpatory and continued to insist that he and Colson were being framed. Moulton asked Colson to set aside an entire day so that the two of them could meet and plan their defense. They agreed to meet on Sunday, December 26.

After learning from the telephone recordings about the meeting planned for December 26, the police obtained Colson's consent to be equipped with a body wire transmitter to record what was said at the meeting. Chief Keating later testified that he did this for Colson's safety in case Moulton

[3] Colson testified that he never told Moulton about the threatening calls that he had received.

realized that Colson was cooperating with the police, and to record any further conversation concerning threats to witnesses. Keating also testified that he was aware that Moulton and Colson were meeting to discuss the charges for which Moulton was already under indictment. Colson was instructed "not to attempt to question Perley Moulton, just be himself in his conversation . . . ."

The December 26 meeting, as was to be expected from the recorded telephone conversations, consisted of a prolonged discussion of the pending charges—what actually had occurred, what the State's evidence would show, and what Moulton and Colson should do to obtain a verdict of acquittal. The idea of eliminating witnesses was briefly mentioned early in the conversation. After a short discussion, encouraged by Colson,[4] Moulton concluded that he did not think the plan would work. The remainder of the lengthy meeting was spent discussing the case. Moulton and Colson decided to create false alibis as their defense at trial. Because they sought to conform these alibis as closely as possible to what really happened, much of their discussion involved recounting the crimes. Although Colson had described what had happened in detail when he confessed to the police a month earlier, he now frequently professed to be unable to recall the

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[4] The exchange went as follows:

"[Moulton:] You know I thought of a way to eliminate them. Remember we were talking about it before?

"[Colson:] Yes, you thought of a way?

"[Moulton:] Yeah, but . . . I don't think we ought to go for it.

"[Colson:] Is it foolproof?

"[Moulton:] No.

"[Colson:] Is it, is it fairly foolproof?

"[Moulton:] I like it. I think its just for the . . . .

"[Colson:] Well let me [hear it]."

Moulton explained that he had considered using air rifles to shoot poisoned darts and the conversation then turned to joking about a magazine that instructed readers how to build bombs to kill large numbers of people. Exh. S–4, Tr. of Dec. 26 Meeting 18–19.

events. Apologizing for his poor memory, he repeatedly asked Moulton to remind him about the details of what had happened, and this technique caused Moulton to make numerous incriminating statements.[5] Nor were all of Colson's memory lapses related to events that required discussion to fabricate convincing alibis. Colson also "reminisced" about events surrounding the various thefts, and this technique too elicited additional incriminating statements from Moulton. For example, Colson asked Moulton how many locks they had drilled to steal a truck, a fact obviously not relevant to developing an alibi. Similarly, Colson questioned Moulton about whether it was the Mustang or the pickup truck that did not have a heater. Later, Colson jokingly drew forth admissions from Moulton concerning the dumping of a stolen truck into a pond after it had been scavenged for parts, and the dumping of a load of potatoes from another stolen truck onto the road. Each of these statements was later admitted into evidence against Moulton at trial.

Moulton filed a pretrial motion to suppress recorded statements he made to Colson in the three telephone conversations and at the December 26 meeting, arguing, *inter alia*, that the statements were obtained in violation of the Sixth and Fourteenth Amendments. After a hearing, the trial court denied the motion. The trial court found that the recordings were made "in order to gather information concerning the anonymous threats that Mr. Colson had been

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[5] Colson began doing this immediately after Moulton vetoed the plan to eliminate witnesses. Colson indicated that he did not have copies of all the discovery materials, and Moulton went outside to his car to get his copies. While Moulton was gone, Colson sighed heavily and whispered "[o]h boy, I just hope I can make it through this" into the microphone. Then, when Moulton returned moments later, Colson immediately stated, slowly and deliberately: "I want you to help me with some dates. One date I cannot remember Caps [Moulton's nickname], just can't remember, I know it was in December, what night did we break into Lothrop Ford? What date?" *Id.*, at 23.

receiving, to protect Mr. Colson and to gather information concerning defendant Moulton's plans to kill Gary Elwell."

Meanwhile, after Colson's role as an informant had been revealed to Moulton, the State had the pending indictments dismissed and obtained seven new indictments against Moulton. These indictments realleged the pending charges, and charged Moulton in addition with burglary, arson, and three more thefts. Moulton pleaded guilty to the charges contained in two of these indictments, and the trial court dismissed two more for improper venue. Moulton waived his right to a jury and proceeded to trial on the remaining three indictments, which covered the subjects of the original indictments and charged him with burglary, arson, and theft. At the trial, the State did not offer into evidence anything from the recorded telephone conversations, but did offer portions of the tapes of the December 26 meeting, principally those involving direct discussion of the thefts for which Moulton was originally indicted. The State did not offer the portion of the meeting during which Moulton and Colson discussed the possibility of killing witnesses and offered only one portion of the discussion about developing false testimony. At the conclusion of the trial, the court dismissed one more count of theft for improper venue and found Moulton not guilty of the arson charge. The court found Moulton guilty, however, of burglary and theft in connection with the Ford pickup truck, the Chevrolet dump truck, and the Ford automotive parts.

Moulton appealed these convictions on the ground that the admission into evidence of his statements to Colson violated his Sixth Amendment right to the assistance of counsel. The State filed a cross-appeal objecting to the dismissal of charges for improper venue. The Supreme Judicial Court of Maine granted both appeals and remanded for a new trial. 481 A. 2d 155 (1984). Regarding the admission of Moulton's recorded statements to Colson, the court agreed that there was "ample evidence" to support the trial court's finding that

the police wired Colson for legitimate purposes, but held that "[r]eference to the State's legitimate motive may be relevant to, but cannot wholly refute, the alleged infringement of Moulton's right to counsel." *Id.*, at 160. The court held that the State cannot use against Moulton at trial recordings of conversations where the State "knew, or should have known" that Moulton would make incriminating statements regarding crimes as to which charges were already pending. Pointing to Moulton's close relationship with Colson, the fact that the purpose of their meeting was to discuss the pending charges, and the fact that at the time of the meeting Colson was "fully cooperating with the police and no longer stood in the same adversarial position as did Moulton," the court held:

> "When the police recommended the use of the body wire to Colson they intentionally created a situation that they knew, or should have known, was likely to result in Moulton's making incriminating statements during his meeting with Colson. The police's valid purpose in investigating threats against witnesses does not immunize the recordings of Moulton's incriminating statements from constitutional attack. Those statements may be admissible in the investigation or prosecution of charges for which, at the time the recordings were made, adversary proceedings had not yet commenced. But as to the charges for which Moulton's right to counsel had already attached, his incriminating statements should have been ruled inadmissible at trial, given the circumstances in which they were acquired." *Id.*, at 161.

We granted the State's petition for certiorari. 469 U. S. 1206. We affirm.

II

A

The right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is indispensable to the fair administration of our adversarial system of criminal jus-

tice.[6] Embodying "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself," *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938), the right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding. Justice Sutherland's oft-quoted explanation in *Powell* v. *Alabama*, 287 U. S. 45 (1932), bears repetition here:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every stage of the proceedings against him." *Id.*,

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[6] Justice Black explained in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963): "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court . . . cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Id.*, at 344.

at 68–69 (quoted in *Gideon* v. *Wainwright*, 372 U. S. 335, 344–345 (1963)).

As indicated in the last sentence of this paragraph, the Court has also recognized that the assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, "critical" stages in the criminal justice process "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Wade*, 388 U. S. 218, 224 (1967) (quoted in *United States* v. *Gouveia*, 467 U. S. 180, 189 (1984)). See, *e. g.*, *Coleman* v. *Alabama*, 399 U. S. 1 (1970); *Hamilton* v. *Alabama*, 368 U. S. 52 (1961); *White* v. *Maryland*, 373 U. S. 59 (1963); *Escobedo* v. *Illinois*, 378 U. S. 478 (1964); *Kirby* v. *Illinois*, 406 U. S. 682 (1972). And, "[w]hatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . . ." *Brewer* v. *Williams*, 430 U. S. 387, 398 (1977). This is because, after the initiation of adversary criminal proceedings, "'the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Gouveia*, *supra*, at 189 (quoting *Kirby* v. *Illinois*, *supra*, at 689).

B

Once the right to counsel has attached and been asserted, the State must of course honor it.[7] This means more than

[7] Cf. *Brewer* v. *Williams*, 430 U. S. 387 (1977): "[T]he lawyer is the essential medium through which the demands and commitments of the sover-

simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance. We have on several occasions been called upon to clarify the scope of the State's obligation in this regard, and have made clear that, at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.

In *Spano* v. *New York*, 360 U. S. 315 (1959), the defendant, who had already been indicted, was coercively interrogated by police until the early hours of the morning despite his repeated requests to see his lawyer. A unanimous Court reversed his conviction on the ground that the confession obtained by this interrogation was involuntary and therefore should not have been admitted into evidence at trial. Four Justices, in two concurring opinions, stated that they would also have reached this result on the ground that Spano's Sixth Amendment right to the assistance of counsel was violated. These Justices reasoned that to permit police to "produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction" in the absence of counsel, after the right to counsel has attached, is to deny the accused "effective representation by counsel at the only stage when legal aid and advice would help him." *Id.*, at 325–326 (Douglas, J., concurring, joined by Black and BRENNAN, JJ.); see also, *id.*, at 326–327 (Stewart, J., concurring, joined by Douglas and BRENNAN, JJ.). As Justice Douglas succinctly put the point, "what use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses?" *Id.*, at 326.

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eign are communicated to the citizen. If, in the long run, we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer." *Id.*, at 415 (STEVENS, J., concurring) (footnote omitted).

The position of the concurring Justices in *Spano* was adopted by the Court in *Massiah* v. *United States*, 377 U. S. 201 (1964). Massiah was indicted, along with a man named Colson,[8] for conspiracy to possess and to distribute cocaine. Massiah retained a lawyer, pleaded not guilty and was released on bail. Colson, meanwhile, decided to cooperate with Government agents in their continuing investigation of the narcotics activity in which Massiah and others were thought to be engaged. Colson permitted a Government agent to install a radio transmitter under the front seat of his automobile. Massiah held a lengthy conversation with Colson in this automobile while a Government agent listened over the radio. Massiah made several incriminating statements, and these were brought before the jury through the testimony of the Government agent. We reversed Massiah's conviction on the ground that the incriminating statements were obtained in violation of Massiah's rights under the Sixth Amendment. The Court stressed the fact that the interview took place after indictment, at a time when Massiah was clearly entitled to the assistance of counsel. Relying on Justice Douglas' *Spano* concurrence, the Court concluded that the need for, and consequently the right to, the assistance of counsel applied equally in this extrajudicial setting as at the trial itself. 377 U. S., at 204.[9] Consequently, the Court held:

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[8] The parties have taken pains to assure us that Massiah's friend Colson and Moulton's friend Colson are unrelated.

[9] Justice Stewart noted that this view of the right to counsel "no more than reflects a constitutional principle established as long ago as *Powell* v. *Alabama*," where the Court noted that

"'during perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants [are] as much entitled to such aid [of counsel] . . . as at the trial itself.'" *Massiah*, 377 U. S., at 205 (quoting *Powell* v. *Alabama*, 287 U. S. 45, 57 (1932)).

> "[Massiah] was denied the basic protections of [the right to the assistance of counsel] when there was used against him at trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Id.*, at 206.

We applied this principle most recently in *United States* v. *Henry*, 447 U. S. 264 (1980). Henry was arrested and indicted for bank robbery. Counsel was appointed, and Henry was held in jail pending trial. Nichols, an inmate at the same jail and a paid informant for the Federal Bureau of Investigation, told a Government agent that he was housed in the same cellblock as several federal prisoners, including Henry. The agent told Nichols to pay attention to statements made by these prisoners, but expressly instructed Nichols not to initiate any conversations and not to question Henry regarding the bank robbery. Nichols and Henry subsequently engaged in some conversations during which Henry told Nichols about the robbery. Nichols testified about these conversations at Henry's trial, and Henry was convicted.

This Court reversed, finding that the Government had "'deliberately elicited' incriminating statements from Henry within the meaning of *Massiah*." *Id.*, at 270. Several facts were emphasized in THE CHIEF JUSTICE's opinion for the Court: that Nichols was acting as an informant for the Government and therefore had an incentive to produce useful information; that Henry was unaware of Nichols' role as a Government informant; and, finally, that Henry and Nichols were incarcerated together at the time the conversations took place. With respect to this last fact, the Court reasoned that "confinement may bring into play subtle influences that will make [an individual] particularly susceptible to the ploys of undercover Government agents," influences that were facilitated by Nichols' "apparent status as a person sharing a common plight." *Id.*, at 274. Considering Nich-

ols' conversations with Henry in light of these circumstances, the Court concluded that Nichols "deliberately used his position to secure incriminating information from Henry when counsel was not present" in violation of the Sixth Amendment. *Id.*, at 270–271. The Government argued that it should not be held responsible for Nichols' conduct because its agent had instructed Nichols not to question Henry and had not intended that Nichols take affirmative steps to obtain incriminating statements. We rejected this argument, finding that, under the circumstances, the agent "must have known" that Nichols would take affirmative steps to secure incriminating information. *Id.*, at 271. Consequently, the Court held, "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." *Id.*, at 274.

C

The State contends that the decisive fact in *Massiah* and *Henry* was that the police set up the confrontation between the accused and a police agent at which incriminating statements were elicited. Supported by the United States as *amicus curiae*, the State maintains that the Sixth Amendment is violated only when police intentionally take this or some equivalent step. Because Moulton rather than Colson initiated the recorded telephone conversations and requested the December 26 meeting, the State concludes that Moulton's Sixth Amendment rights were not violated here.

In the first place, the identity of the party who instigated the meeting at which the Government obtained incriminating statements was not decisive or even important to our decisions in *Massiah* or *Henry*. Thus, while in *Massiah* it may have been the Government agent who was responsible for setting up the meeting with the defendant,[10] one discovers

[10] It is not clear whether the informant asked to meet with Massiah or vice versa. Both the opinion for the Second Circuit and the dissent state

this only by looking to the opinions of the Court of Appeals. It is not mentioned in this Court's opinion since the issue of who set up the meeting with whom was not pertinent to our disposition. Moreover, four years after *Massiah*, the Court summarily reversed a conviction where the defendant requested the meeting and initiated and led the conversation in which incriminating statements were made to an undercover informant. *Beatty* v. *United States*, 389 U. S. 45 (1967) *(per curiam)*. In that case, the Solicitor General made the same argument that he and the State make today, see Brief in Opposition, *Beatty* v. *United States*, O. T. 1967, No. 338, pp. 5–8; we rejected this argument in an opinion that simply cited *Massiah*.[11] Finally, in *Henry*, we deemed it "irrelevant that in *Massiah* the agent had to arrange the meeting between Massiah and his codefendant while here the agents were fortunate enough to have an undercover informant already in close proximity to the accused." 447 U. S., at 272, n. 10.

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only that, on the instructions of a Government agent, Colson invited Massiah into his car to discuss their case; neither opinion establishes who requested the meeting in the first place. See *United States* v. *Massiah*, 307 F. 2d 62, 66 (1962); *id.*, at 72 (Hays, J., dissenting). It is quite plausible that Massiah asked to see Colson who then proposed meeting in his car. In fact, there is nothing in the record in *Massiah* to support even the assertion of the Court of Appeals that Colson rather than Massiah suggested meeting in Colson's car, although the inference is logical enough. See App. to Brief for United States in *Massiah* v. *United States*, O. T. 1963, No. 199, pp. 125a–175a (testimony of Agent Murphy).

[11] In his *amicus* brief for the United States in this case, the Solicitor General suggests that *Beatty* did not survive *Brewer* v. *Williams*, 430 U. S. 387 (1977), which, he contends, modified *Massiah* to require affirmative interrogation by the Government. Brief for United States as *Amicus Curiae* 17, n. 12. *That* argument, however, was expressly rejected when the Solicitor General made it in *Henry*. See 447 U. S., at 271 ("While affirmative interrogation, absent waiver, would certainly satisfy *Massiah*, we are not persuaded, as the Government contends, that *Brewer* v. *Williams* . . . modified *Massiah*'s 'deliberately elicited' test"). Cf. also, Brief for United States in *United States* v. *Henry*, O. T. 1979, No. 121, p. 26, n. 12.

Beyond this, the State's attempt to limit our holdings in *Massiah* and *Henry* fundamentally misunderstands the nature of the right we recognized in those cases. The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached. See *Henry*, 447 U. S., at 276 (POWELL, J., concurring). However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.[12]

III

Applying this principle to the case at hand, it is clear that the State violated Moulton's Sixth Amendment right when it arranged to record conversations between Moulton and its undercover informant, Colson. It was the police who suggested to Colson that he record his telephone conversations with Moulton. Having learned from these recordings that

[12] Direct proof of the State's knowledge will seldom be available to the accused. However, as *Henry* makes clear, proof that the State "must have known" that its agent was likely to obtain incriminating statements from the accused in the absence of counsel suffices to establish a Sixth Amendment violation. See 447 U. S., at 271.

Moulton and Colson were going to meet, the police asked Colson to let them put a body wire transmitter on him to record what was said. Police Chief Keating admitted that, when they made this request, the police knew—as they must have known from the recorded telephone conversations—that Moulton and Colson were meeting for the express purpose of discussing the pending charges and planning a defense for the trial.[13] The police thus knew that Moulton would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel. As in *Henry*, the fact that the police were "fortunate enough to have an undercover informant already in close proximity to the accused" does not excuse their conduct under these circumstances. 447 U. S., at 272, n. 10. By concealing the fact that Colson was an agent of the State, the police denied Moulton the opportunity to consult with counsel and thus denied him the assistance of counsel guaranteed by the Sixth Amendment.[14]

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[13] Because Moulton thought of Colson only as his codefendant, Colson's engaging Moulton in active conversation about their upcoming trial was certain to elicit statements that Moulton would not intentionally reveal—and had a constitutional right not to reveal—to persons known to be police agents. Under these circumstances, Colson's merely participating in this conversation was "the functional equivalent of interrogation." *Henry*, 447 U. S., at 277 (POWELL, J., concurring). In addition, the tapes disclose and the Supreme Judicial Court of Maine found that Colson "frequently pressed Moulton for details of various thefts and in so doing elicited much incriminating information that the State later used at trial." 481 A. 2d, at 161. Thus, as in *Henry*, *supra*, at 271, n. 9, we need not reach the situation where the "listening post" cannot or does not participate in active conversation and prompt particular replies.

[14] The State argues that it took steps to prevent Colson from inducing Moulton to make incriminating admissions by instructing Colson to "be himself," "act normal," and "not interrogate" Moulton. Tr. of Hearing on Motion to Suppress 42, 51, 56. In *Henry*, we rejected this same argument although the likelihood that the accused would talk about the pending charges to a cellmate was less than here, where the accused invited his codefendant to discuss the upcoming trial, and although the instructions to the agent were far more explicit. See 447 U. S., at 268, 271. More im-

IV

The Solicitor General argues that the incriminating statements obtained by the Maine police nevertheless should not be suppressed because the police had other, legitimate reasons for listening to Moulton's conversations with Colson, namely, to investigate Moulton's alleged plan to kill Gary Elwell and to insure Colson's safety. In *Massiah*, the Government also contended that incriminating statements obtained as a result of its deliberate efforts should not be excluded because law enforcement agents had "the right, if not indeed the duty, to continue their investigation of [Massiah] and his alleged criminal associates . . . ." 377 U. S., at 206. There, as here, the Government argued that this circumstance justified its surveillance and cured any improper acts or purposes. We rejected this argument, and held:

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portantly, under the circumstances of this case, the instructions given to Colson were necessarily inadequate. The Sixth Amendment protects the right of the accused not to be confronted by an agent of the State regarding matters as to which the right to counsel has attached without counsel being present. This right was violated as soon as the State's agent engaged Moulton in conversation about the charges pending against him. Because these charges were the only subject to be discussed at Colson's December 26 meeting with Moulton, a Sixth Amendment violation was inevitable once Colson agreed to this meeting with Moulton.

In any event, we reject the State's suggestion that these instructions were designed to protect Moulton's constitutional rights. The instructions were obviously motivated by the police's concern that Colson, who had never before served as an undercover agent, might behave unnaturally or ask too many questions, thereby tipping Moulton off to the fact that Colson was cooperating with the police. Thus, rather than explain to Colson that actively questioning Moulton might taint any evidence obtained, the police simply told Colson to "be himself," and to "act normal." Tr. of Hearing on Motion to Suppress 42, 51, 56. In addition, the instructions were not limited to questions concerning the pending charges, the only matters as to which active questioning might create problems. On the contrary, according to Chief Keating, Colson was instructed that he could engage Moulton in a conversation but should not try to draw him out on "elimination of witnesses or anything." *Id.*, at 51.

> "We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial." *Id.*, at 207 (emphasis omitted).

We reaffirm this holding, which states a sensible solution to a difficult problem. The police have an interest in the thorough investigation of crimes for which formal charges have already been filed. They also have an interest in investigating new or additional crimes. Investigations of either type of crime may require surveillance of individuals already under indictment. Moreover, law enforcement officials investigating an individual suspected of committing one crime and formally charged with having committed another crime obviously seek to discover evidence useful at a trial of either crime.[15] In seeking evidence pertaining to pending charges,

[15] In his brief, the Solicitor General assumes that the only claim made by the Government and answered by the Court in *Massiah* was that the Government was engaged in a continuing investigation of crimes as to which charges were already pending. He concedes that this was an inadequate justification which "had the flavor of a post hoc rationalization of conduct that, at its inception, in fact had as a primary purpose the obtaining of evidence for use at trial on the pending charges." Brief for United States as *Amicus Curiae* 23–24. So saying, he asks us to distinguish from that justification the justification that law enforcement officials are investigating "separate" crimes. In *Massiah*, however, the Government's assertion was that it needed to continue its investigation in order to discover the identities of Massiah's intended buyer and of others who were importing narcotics as well as to find additional evidence of Massiah's crimes. Brief for United States in *Massiah* v. *United States*, O. T. 1963, No. 199, pp. 26–27. The Court in *Massiah* was thus faced with the very same argument made by the Solicitor General in this case. Even were the Solicitor General's characterization of the issue posed in *Massiah* correct, however,

however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused. To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in *Massiah*. On the other hand, to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel.[16]

Because we hold that the Maine police knowingly circumvented Moulton's right to have counsel present at a confrontation between Moulton and a police agent, the fact that the police had additional reasons for recording Moulton's meeting with Colson is irrelevant. The decision of the Supreme Judicial Court of Maine is affirmed.

It is so ordered.

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we would not draw the distinction he asks us to make. The likelihood of *post hoc* rationalizing is the same whether police claim to be investigating other examples of the same crime or some allegedly "separate" crime. We take what we feel is a more realistic view of police investigations, and instead accept that dual purposes may exist whenever police have more than one reason to investigate someone.

[16] Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, and with whom JUSTICE O'CONNOR joins as to Parts I and III, dissenting.

Today the Court holds that the Sixth Amendment prohibits the use at trial of postindictment statements made to a government informant, even where those statements were recorded as part of a good-faith investigation of entirely separate crimes. Nothing whatever in the Constitution or our prior opinions supports this bizarre result, which creates a new "right" only for those possibly habitual offenders who persist in criminal activity even while under indictment for other crimes. I dissent and would reverse.

I

Before reaching the legal issues, it is important that the factual basis on which the State acted here be clearly understood. Since the Court's opinion glosses over some of the more relevant facts, I review them here briefly.

After respondent and a codefendant, Gary Colson, were indicted on several felony counts of theft by receiving stolen goods, Colson telephoned Belfast Police Chief Robert Keating to arrange a meeting. At that meeting, on November 4, 1982, Colson told Chief Keating that he had been receiving "threatening phone calls" and that "it had gone too far." In this conversation, Colson indicated his desire to tell Chief Keating about the circumstances giving rise to the indictment; but Chief Keating appropriately cautioned him to consult with an attorney before saying more.

Two days later, Colson and respondent met. Respondent spoke of "[g]etting rid of a couple of witnesses," including Gary Elwell, a key prosecution witness in the upcoming trial of Colson and respondent. Respondent had formulated a general plan for the murder; Colson's role was to pick up a car to be used in that endeavor.

On November 9 and 10, Colson met with Chief Keating and Detective Rex Kelley of the Maine State Police at the office

of Colson's attorney. At these meetings, Colson revealed to the police respondent's plan to kill Elwell. Keating was aware that several witnesses connected with the case had received threats. One witness, Duke Ducaster, had been threatened personally by respondent. Another witness, Herman Peasley, "had been told . . . that a cup of acid could be thrown in his face" if he talked to the police. Colson then consented to having the police place a recording device on his home telephone. Keating testified that he placed the device on the telephone because respondent was to call Colson back when plans to eliminate Elwell had been finalized and because Colson himself had been receiving anonymous threatening telephone calls.

Three telephone calls initiated by respondent were subsequently recorded. In the first, on November 22, 1982, respondent, in an apparent reference to the plan to do away with Elwell, told Colson that he had "come up with a method" and that he wanted to get together with Colson to talk about it after he had "work[ed] out the details on it." In the second recorded conversation, respondent reviewed with Colson the extent of the evidence against them and made several incriminating statements. In the last of the recorded conversations, respondent again incriminated himself[1] and

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[1] Contrary to the Court's assertion that "the conversation ended without Moulton having said anything that incriminated him," *ante*, at 164, Moulton and Colson in fact rehearsed a fabricated story that they planned to use at trial:

"[Moulton:] The parts I bought. I never denied that. I did buy those. . . .

"[Colson:] The [M]ustang . . . same here.

"[Moulton:] And the [M]ustang, we bought that?

"[Colson:] Yeah.

"[Moulton:] Ok. It's just a coincidence that ah, they happened to be . . . [h]ot or whatever. . . . You've got a bill of sale for the Mustang. I got a bill of sale for parts. So, you know, what the hell? What can they say?" Exh. S–3, Tr. of Dec. 14 Conversation 4–5.

referred to statements by witnesses that they had been threatened. Finally, respondent told Colson that he wanted to meet to "review the whole plan."

Chief Keating and Detective Kelley then arranged for Colson to wear a body recorder/transmitter during this meeting. Both officers testified that the recorder was intended to protect Colson's safety, since respondent might have learned that Colson was cooperating with the police, as well as to record any information concerning threats to other witnesses. Colson himself testified that his understanding of the reasons for using the recorder were "number 1 . . . my safety" and "number 2 . . . for any other plans to do away with any of the witnesses." When asked if there was a "number 3," Colson testified "no." The police instructed Colson "to act like himself, converse normally, and avoid trying to draw information out of Moulton."

During the meeting with Colson, respondent without any prompting brought up the possibility of killing Gary Elwell, by means of an air gun with hollow-tipped darts or explosives.[2] Respondent also suggested developing false testi-

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[2] After a break in the conversation, respondent took a deep sigh and said:

"[Moulton:] You know I thought of a way to eliminate them. Remember we were talking about it before?

"[Colson:] Yes, you thought of a way?

"[Moulton:] Yeah, but, ah, I don't think we ought to go for it. . . .

"[Colson:] Well, let me [hear it].

"[Moulton:] Well you know those air guns. . . . They make little darts for those little feather back darts that you can put in there you've seen em. Those little darts, those little things about that long. I [was] thinking just hollow the tip out like a needle and just put . . . little . . . holes on the side, and you fill it with a lethal injection and the shooting impact would shoot all the stuff out of it into . . . the individuals body [and] poison [th]em. There would be no noise.

"[Colson:] Jesus. . . .

"[Moulton:] That's the only thing that runs through my brain . . . you have a puncture wound, probably take about 20 or 30 minutes to kick off,

mony for presentation at trial. These portions of the transcript were not admitted into evidence at trial. In addition, there was direct discussion of the thefts for which respondent had been indicted; these portions of the transcript were admitted. The trial court refused to suppress these portions since the State had recorded the conversations "for legitimate purposes not related to the gathering of evidence concerning the crime for which [respondent] had been indicted—*i. e.*, in order to gather information concerning the anonymous threats that Mr. Colson had been receiving, to protect Mr. Colson and to gather information concerning [respondent's] plans to kill Gary Elwell." The Maine Supreme Court in a careful opinion found "ample evidence" to support this factual finding.

II

The Court today concludes that "[t]o allow the admission of evidence obtained from an accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance . . . risks the evisceration of the Sixth Amendment right recognized in *Massiah*." *Ante*, at 180. With all deference I am bound to state that this conclusion turns the Sixth Amendment on its head by first positing a constitutional violation and then asking whether "alternative, legitimate reasons" for the police surveillance are sufficient to justify that constitutional viola-

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yeah, and the other problem is the poison, where . . . are you going to get some poison? Small bottles.

"[Colson:] What was that stuff you told me about once?

"[Moulton:] Calcium chlorine . . . , yeah, something like that, just a small drop will make you look like you have a heart attack and . . . you'd never, never, find it unless you were looking . . . exactly for that drug. . . . Stops your heart." Exh. S–4, Tr. of Dec. 26 Meeting 18–20.

Moulton then discussed an alternative scheme for doing away with witnesses, based on making explosives pursuant to directions contained in a magazine that one of his "best friends" was sending. Moulton described him as having belonged to "a motorcycle gang" and also suggested ominously that he had "[p]robably snuffed one or two people." *Id.*, at 21.

tion. As I see it, if "alternative, legitimate reasons" motivated the surveillance, then no Sixth Amendment violation has occurred. Indeed, if the police had failed to take the steps they took here knowing that Colson was endangering his life by talking to them, in my view they would be subject to censure.

Analysis of this issue must begin with *Hoffa* v. *United States*, 385 U. S. 293 (1966), not cited in the Court's opinion. In *Hoffa*, the Court held that postindictment statements obtained by a Government informant "relat[ing] to the commission of a quite separate offense," *id.*, at 308, were properly admitted at a subsequent trial for the separate crime. Other courts have also held that *Massiah*, viewed in light of the later-decided *Hoffa* case, does not prohibit the introduction of incriminating statements obtained in good faith by the Government even after an indictment at a trial involving an offense different from that covered by the indictment. See, *e. g.*, *Mealer* v. *Jones*, 741 F. 2d 1451, 1455 (CA2 1984), cert. denied, 471 U. S. 1006 (1985); *United States* v. *Lisenby*, 716 F. 2d 1355, 1357–1359 (CA11 1983) (en banc).

Applying *Hoffa* to the facts of this case, it is clear that the statements obtained by Colson could have been introduced against respondent at a subsequent trial for crimes apart from those for which respondent had already been indicted, such as conspiracy to commit murder or to obstruct justice. The majority concedes as much: "Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses." *Ante*, at 180, n. 16. It follows from this that the State engaged in no impermissible conduct in its investigation of respondent based on Colson's revelations. By recording conversations between respondent and Colson, Chief Keating and Detective Kelley succeeded in obtaining evidence that the Court's opinion concedes could have been used to convict respondent of further crimes. In fact this record shows clearly that, based on the recordings, the State

was able to obtain additional indictments against respondent for burglary, arson, and three more thefts. The Court's opinion notes that respondent pleaded guilty to several of the additional indictments secured as a result of pursuing Colson's leads. *Ante*, at 167.

Courts ought to applaud the kind of careful and diligent efforts of the police shown by this record. Indeed, the Court's opinion does not suggest that the police should have—or could have—conducted their investigation in any other way. Yet, inexplicably, the Court holds that the highly probative and reliable evidence produced by this wholly legitimate investigation must be excluded from respondent's trial for theft. The anomaly of this position, then, is that the evidence at issue in this case should have been excluded from respondent's theft trial even though the *same evidence* could have been introduced against *respondent himself* at a trial for separate crimes. Far from being "a sensible solution to a difficult problem," *ante*, at 179, as the Court modestly suggests, it is a judicial aberration conferring a windfall benefit to those who are the subject of criminal investigations for one set of crimes while already under indictment for another. I can think of no reason to turn the Sixth Amendment into a "magic cloak," *United States* v. *DeWolf*, 696 F. 2d 1, 3 (CA1 1982), to protect criminals who engage in multiple offenses that are the subject of separate police investigations.

We have held that no Sixth Amendment violation occurs unless the State "deliberately elicit[s]" comments from the defendant. See *Massiah* v. *United States*, 377 U. S. 201, 206 (1964); *United States* v. *Henry*, 447 U. S. 264, 270 (1980). As the foregoing amply demonstrates, however, a finding of "deliberate elicitation" is not the end of the inquiry. In using the phrase "deliberate elicitation," we surely must have intended to denote elicitation for the purpose of using such statements against the defendant in connection with charges for which the Sixth Amendment right to counsel had attached. Here the State indeed set out to elicit information

from a defendant, but it was an investigation with respect to crimes other than those for which the defendant then stood indicted. As two courts found, the State recorded the conversations "'for legitimate purposes not related to the gathering of evidence concerning the crime for which [respondent] had been indicted.'" 481 A. 2d 155, 160 (Me. 1984) (quoting trial court).

No prior holding of this Court recognizes a Sixth Amendment violation in such circumstances. As one court has put it, the Sixth Amendment "speaks only to the situation where in the absence of retained counsel, statements are deliberately elicited from a defendant in connection with a crime for which he has already been indicted." *United States* v. *Hinton*, 543 F. 2d 1002, 1015 (CA2), cert. denied *sub nom. Carter* v. *United States*, 429 U. S. 980 (1976).[3] Thus, in *United States* v. *Henry*, *supra*, at 275, n. 14, we quoted Disciplinary Rule 7–104(A)(1) of the American Bar Association's Code of Professional Responsibility, which provides that "'a lawyer shall not . . . [c]ommunicate or cause another to communicate *on the subject of the representation* with a

[3]The Court's opinion seems to read *Massiah* as if it definitively addresses situations where the police are investigating a separate crime. This reading is belied by the *Massiah* Court's statement of its own holding: "We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents *under the circumstances here disclosed*, could not constitutionally be used by the prosecution as evidence against *him* at his trial." *Massiah* v. *United States*, 377 U. S. 201, 207 (1964) (first emphasis added).

The reference to the "circumstances here disclosed" must be to the fact that the Government, far from pursuing a good-faith investigation of different crimes, had "instructed the informant to engage [Massiah] in conversation relating to the crimes [for which he had already been indicted]." *United States* v. *Henry*, 447 U. S. 264, 276 (1980) (POWELL, J., concurring); Brief for Petitioner in *Massiah* v. *United States*, O. T. 1963, No. 199, p. 4.

party he knows to be represented by a lawyer in that matter'" (emphasis added). Our reference in *Henry* to this rule illustrates that we have framed the Sixth Amendment issue in terms of whether the State deliberately circumvented counsel with regard to the "subject of representation." But where, as here, the incriminating statements are gathered for "an alternative, legitimate reason," *ante*, at 180, wholly apart from the pending charges, no such deliberate circumvention exists.

The Court's opinion seems to rest on the notion that the evidence here is excludable because "the State 'must have known' that its agent was likely to obtain incriminating statements from the accused," *ante*, at 176, n. 12, with respect to the crimes for which he was already indicted. But the inquiry mandated by our holdings is whether the State recorded the statements not merely *in spite of*, but *because of* that consequence. Cf. *Wayte* v. *United States*, 470 U. S. 598 (1985). If the State is not seeking to elicit information with respect to the crime for which the defendant is already indicted, it cannot rationally be said that the State has "planned an impermissible interference with the right to the assistance of counsel." *Henry*, *supra*, at 275.

This case is a particularly inappropriate one for invoking the right to counsel. The right to counsel recognized in *Massiah* was designed to preserve the integrity of the trial. See 377 U. S., at 204. Here respondent was under investigation because of his plans to obstruct justice by killing an essential witness. There is no right to consult an attorney for advice on committing crimes. See *United States* v. *Merritts*, 527 F. 2d 713, 716 (CA7 1975). Indeed, any attorney who undertook to offer such advice would undoubtedly be subject to sanction. Disciplinary Rule 7–102(A)(7) of the Code of Professional Responsibility, for example, states "a lawyer shall not . . . [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." Thus there is no warrant for vindicating respondent's right to con-

sult counsel. An observation of this Court in connection with the attorney-client evidentiary privilege bears mention here: "The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." *Clark* v. *United States*, 289 U. S. 1, 15 (1933). I would let the truth be told in this case rather than exclude evidence that was the product of this police investigation into activities designed to thwart the judicial process.

Even though the *Massiah* rule is inapplicable to situations where the government is gathering information related to a separate crime, police misconduct need not be countenanced. Accordingly, evidence obtained through a separate crimes investigation should be admitted only "so long as investigating officers show no bad faith and do not institute the investigation of the separate offense as a pretext for avoiding the dictates of *Massiah*." *United States* v. *Darwin*, 757 F. 2d 1193, 1199 (CA11 1985). Here the careful actions of Chief Keating and Detective Kelley steered well clear of these prohibitions.

Until today, the clearly prevailing view in the federal and state courts was that *Massiah* and its successors did not protect a defendant from the introduction of postindictment statements deliberately elicited when the police undertook an investigation of separate crimes.[4] As two leading commentators have observed:

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[4] See *United States* v. *DeWolf*, 696 F. 2d 1, 3 (CA1 1982); *Grieco* v. *Meachum*, 533 F. 2d 713, 717–718 (CA1 1976), cert. denied *sub nom. Cassesso* v. *Meachum*, 429 U. S. 858 (1976); *United States* v. *Hinton*, 543 F. 2d 1002, 1015 (CA2), cert. denied *sub nom. Carter* v. *United States*, 429 U. S. 980 (1976); *United States* v. *Merritts*, 527 F. 2d 713, 716 (CA7 1975); *United States* v. *Taxe*, 540 F. 2d 961, 968–969 (CA9 1976), cert. denied, 429 U. S. 1040 (1977); *United States* v. *Darwin*, 757 F. 2d 1193, 1200 (CA11 1985); *Crawford* v. *State*, 377 So. 2d 145, 156 (Ala. Crim. App.), aff'd, 377 So. 2d 159 (Ala. 1979), vacated and remanded, 448 U. S. 904 (1980); *Deskins* v. *Commonwealth*, 512 S. W. 2d 520, 526 (Ky. 1974), cert. denied, 419 U. S. 1122 (1975); *Hall* v. *State*, 47 Md. App. 590, 596, 425 A. 2d 227,

> "Even before [*Brewer* v.] *Williams*, [430 U. S. 387 (1977),] it was generally accepted that the right to counsel did not bar contact with the defendant concerning *other offenses*, particularly if the offenses were clearly unrelated and it did not appear the charge was simply a pretext to gain custody in order to facilitate the investigation. The more recent cases recognize that [*Massiah* and its progeny do] not confer upon charged defendants immunity from investigation concerning other crimes. This is especially true when the offense under investigation is a new or ongoing one, such as illegal efforts to thwart the forthcoming prosecution." 1 W. LaFave & J. Israel, Criminal Procedure § 6.4, p. 470 (1984) (emphasis added) (footnotes omitted).

Rather than expand *Massiah* beyond boundaries currently recognized, I would take note of the observation that "*Massiah* certainly is the decision in which Sixth Amendment protections have been extended to their outermost point." *Henry*, 447 U. S., at 282 (BLACKMUN, J., dissenting). I would not expand them more and well beyond the limits of precedent and logic.

III

Even if I were prepared to join the Court in this enlargement of the protections of the Sixth Amendment, I would have serious doubts about also extending the reach of the exclusionary rule to cover this case. "Cases involving Sixth Amendment deprivations are subject to the general rule that

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231 (1981), aff'd, 292 Md. 683, 441 A. 2d 708 (1982); *People* v. *Mealer*, 57 N. Y. 2d 214, 218, 441 N. E. 2d 1080, 1082 (1982); *People* v. *Costello*, 101 App. Div. 2d 244, 247, 476 N. Y. S. 2d 210, 212 (1984); *Hummel* v. *Commonwealth*, 219 Va. 252, 257, 247 S. E. 2d 385, 388 (1978), cert. denied, 440 U. S. 935 (1979). Cf. *United States* v. *Moschiano*, 695 F. 2d 236, 243 (CA7 1982), cert. denied, 464 U. S. 831 (1983); *United States* v. *Boffa*, 89 F. R. D. 523 (Del. 1981). But see *Mealer* v. *Jones*, 741 F. 2d 1451, 1455 (CA2 1984), cert. denied, 471 U. S. 1006 (1985); *State* v. *Ortiz*, 131 Ariz. 195, 202, 639 P. 2d 1020, 1028 (1981), cert. denied, 456 U. S. 984 (1982).

remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U. S. 361, 364 (1981). Application of the exclusionary rule here makes little sense, as demonstrated by "weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence." *United States* v. *Leon*, 468 U. S. 897, 907 (1984).

With respect to the costs, applying the rule to cases where the State deliberately elicits statements from a defendant in the course of investigating a separate crime excludes evidence that is "typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." *Stone* v. *Powell*, 428 U. S. 465, 490 (1976). Moreover, because of the trustworthy nature of the evidence, its admission will not threaten "the fairness of a trial or . . . the integrity of the factfinding process." *Brewer* v. *Williams*, 430 U. S. 387, 414 (1977) (POWELL, J., concurring). Hence, application of the rule to cases like this one "deflects the truthfinding process," "often frees the guilty," and may well "generat[e] disrespect for the law and [the] administration of justice." *Stone* v. *Powell*, *supra*, at 490–491.

Against these costs, applying the rule here appears to create precious little in the way of offsetting "benefits." Like searches in violation of the Fourth Amendment, the "wrong" that the Court condemns was "fully accomplished" by the elicitation of comments from the defendant and "the exclusionary rule is neither intended nor able to cure the invasion of the defendant's rights which he has already suffered." *Leon*, *supra*, at 906 (internal quotation omitted).

The application of the exclusionary rule here must therefore be premised on deterrence of certain types of conduct by the police. We have explained, however, that "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some

right." *United States* v. *Peltier*, 422 U. S. 531, 539 (1975). Here the trial court found that the State obtained statements from respondent "for legitimate purposes not related to the gathering of evidence concerning the crime for which [respondent] had been indicted." Since the State was not trying to build its theft case against respondent in obtaining the evidence, excluding the evidence from the theft trial will not affect police behavior at all. The exclusion of evidence "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Leon*, *supra*, at 919. Indeed, as noted above, it is impossible to identify any police "misconduct" to deter in this case. In fact, if anything, actions by the police of the type at issue here should be encouraged. The diligent investigation of the police in this case may have saved the lives of several potential witnesses and certainly led to the prosecution and conviction of respondent for additional serious crimes.

It seems, then, that the Sixth Amendment claims at issue here "closely parallel claims under the Fourth Amendment," *Brewer*, *supra*, at 414 (POWELL, J., concurring), where we have found the exclusionary rule to be inapplicable by weighing the costs and benefits of its applications. See, *e. g.*, *United States* v. *Leon*, *supra* (exclusionary rule inapplicable where officers rely in good faith on defective search warrant issued by neutral magistrate); *Stone* v. *Powell*, *supra* (where full opportunity to litigate Fourth Amendment issues has been afforded, such issues may not be raised in a state habeas petition). If anything, the argument for admission of the evidence here is even stronger because "[t]his is not a case where . . . 'the constable . . . blundered.'" *United States* v. *Henry*, *supra*, at 274–275 (quoting *People* v. *DeFore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926) (Cardozo, J.)).

Because the Court today significantly and unjustifiably departs from our prior holdings, I respectfully dissent.

CLEAVINGER ET AL. *v.* SAXNER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84–732. Argued October 16, 1985—Decided December 10, 1985

Respondent federal prison inmates were found guilty by the prison's Discipline Committee, composed of petitioner prison officials, of encouraging other inmates to engage in a work stoppage and of other charges, and were ordered to be placed in administrative detention and to forfeit a specified number of days of "good time." On appeals to the Warden and the Regional Director of the Bureau of Prisons, respondents were ordered released from administrative detention and all material relevant to the incident in question was ordered expunged from their records. They were later paroled and released. But in the meantime, they brought suit in Federal District Court against petitioners, alleging a violation of various federal constitutional rights and seeking declaratory and injunctive relief and damages. After initially dismissing the complaint on the ground that petitioners were entitled to absolute immunity from liability, the District Court, on reconsideration, reinstated the suit. The case was tried to a jury, which found that petitioners had violated respondents' Fifth Amendment due process rights, and awarded damages. The Court of Appeals affirmed, rejecting petitioners' claim for absolute immunity.

Held: Petitioners are entitled to only qualified immunity. Pp. 199–208. 727 F. 2d 669, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, STEVENS, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE, J., joined, *post*, p. 208.

Deputy Solicitor General Geller argued the cause for petitioners. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Trott*, *Samuel A. Alito, Jr.*, and *Gloria C. Phares*.

G. Flint Taylor argued the cause for respondents. With him on the brief was *Charles W. Hoffman*.*

**John K. Van de Kamp*, Attorney General of California, *Steve White*, Chief Assistant Attorney General, *Arnold O. Overoye*, Assistant Attorney

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether members of a federal prison's Institution Discipline Committee, who hear cases in which inmates are charged with rules infractions, are entitled to absolute, as distinguished from qualified, immunity from personal damages liability for actions violative of the United States Constitution.

I

Respondents David Saxner and Alfred Cain, Jr., in January 1975 were inmates at the Federal Correctional Institution at Terre Haute, Ind. They were serving 4- and 5-year sentences, respectively, and each was within 18 months of a possible release date. Each was soon to appear before the parole board. The prison-conduct record of each was good.

On January 6, 1975, William Lowe, a Negro inmate at Terre Haute died in the prison hospital. He was the first of four Negro inmates to die there within the ensuing 7-month period. A work stoppage to protest Lowe's death took place at the prison on January 7 and 8. Respondent Saxner, a white inmate who had served as a "jailhouse lawyer," and respondent Cain, a Negro inmate who was the librarian for the African and New World Cultural Society, assert that neither of them participated in the stoppage. See Brief for Respondents 1. Each, however, was active in gathering information about Lowe's death and about conditions at the prison hospital, and in passing that information to the press, Members of Congress, prison officials, and Saxner's attor-

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General, *William George Prahl*, Supervising Deputy Attorney General, *Susan J. Orton*, Deputy Attorney General, *Charles A. Graddick*, Attorney General of Alabama, *Michael A. Lilly*, Attorney General of Hawaii, and *A. G. McClintock*, Attorney General of Wyoming, filed a brief for the State of California et al. as *amici curiae* urging reversal.

Stephen M. Latimer filed a brief for Prisoners' Legal Services of New York, Inc., et al. as *amici curiae* urging affirmance.

ney.[1] On February 14, respondents were cited in separate Incident Reports for encouraging other inmates to engage in work stoppage. App. 50, 52. Each was immediately placed in administrative segregation, that is, removed from the general inmate population, and assigned to a separate cell in an unused part of the hospital. See 28 CFR § 541.20(b) (1985).

On the following day, each respondent was given a copy of the Bureau of Prisons Policy Statement 7400.5c (subject: Inmate Discipline) (Oct. 4, 1974). See App. 25–49. Saxner signed a written notice which explained his rights at a hearing to be held before an Institution Discipline Committee. Among these were the right to have a written copy of the charge; the right to have a member of the prison staff represent him; the rights, except where institutional safety would be jeopardized, to be present at the hearing, to call witnesses, and to submit documentary evidence; and the right to receive a written explanation of the committee's decision. *Id.*, at 54.[2] Although the record does not so disclose, we assume that respondent Cain received a similar notice at that time.

Respondents were brought before the Institution Discipline Committee on February 21. The committee was composed of petitioners Theodore Cleavinger, Associate Warden, as chairman; Marvin Marcadis, correctional supervisor; and Tom P. Lockett, chief of case management.[3]

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[1] This activity apparently resulted in a visit to the Terre Haute facility by an Assistant Surgeon General and in a lawsuit concerning the last of the four hospital deaths. See *Green* v. *Carlson*, 581 F. 2d 669 (CA7 1978), aff'd, 446 U. S. 14 (1980).

[2] The Policy Statement did not provide for cross-examination, representation by a lawyer, verbatim record of the proceeding, or nonagency or judicial review. Neither did it specify the standard of proof or the standard of punishment.

[3] The Solicitor General advises us, see Brief for Petitioners 3, n. 4, that a committee of this kind at the Terre Haute facility usually was composed of three members. By regulation, the chairman and one other member must be of department-head level, or higher. See 28 CFR § 541.16(b)

Respondent Saxner was accompanied at the hearing by Ralph Smith, staff counselor, whom Saxner had selected to represent him. After reading the charge and reviewing Saxner's rights, the committee introduced Saxner's Incident Report and three documents found in his cell. These were, respectively, a "press release" Saxner had sent to 50 newspapers; a four-page document which detailed interviews with inmates about their medical treatment at the prison hospital; and a letter from Saxner to an American Civil Liberties Union lawyer, Saunders, which enclosed the other two documents and which discussed medical conditions, possible litigation on behalf of the Lowe family and other inmates, communications with the press, and the obtaining of local counsel. The press release, among other things, advocated administrative approval of a prisoners' union and amnesty for those who had participated in the work stoppage. *Id.*, at 81. Neither the investigating officer nor the charging officer nor any guard was called as a witness. Saxner, however, testified and introduced affidavits of several inmates. His request that he be permitted to call inmates to confirm that he did not encourage any work stoppage was denied on the ground that such testimony would be cumulative. While admitting that he had written the press release and had mailed it to persons outside the prison without authorization, Saxner asserted his innocence on the specific charge referred. *Id.*, at 60, 71.

The committee found respondent Saxner guilty of encouraging a work stoppage. Also, although not specifically so charged, he was found guilty of unauthorized use of the mail and of possession of contraband, that is, material advocating an illegal prisoners' union. The committee ordered that

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(1985). The reporting officer, investigating officer, and any person who was a witness to the incident or played a significant part in having the charge referred, may not be a member of the committee except "where virtually every staff member in the institution witnessed the incident in whole or in part." *Ibid.*

Saxner be placed in administrative detention and forfeit 84 days of "good time." His transfer to another institution was recommended. *Id.*, at 57.

Respondent Cain's hearing took place the same day before the same committee and immediately prior to Saxner's hearing. *Id.*, at 64. He was accompanied by J. R. Alvarado, a staff representative. He was advised of his rights. His Incident Report was produced. Two documents found in his cell (Saxner's letter to Saunders and a manuscript concerning "Ideals and Proposals of the Prisoner Labor Union") were introduced. Cain testified and denied that he had encouraged inmates not to work. He requested the right to cross-examine his accusers, but no other witness was called.

At the conclusion of Cain's hearing, the committee found him guilty of encouraging a work stoppage and, although not specifically so charged, of possessing contraband, that is, "inflammatory material . . . supporting disruptive conduct in the institution." *Id.*, at 65. The committee ordered that Cain be placed in administrative detention and forfeit 96 days of "good time." His transfer to another institution also was recommended. *Ibid.*

Respondents appealed to the Warden of the institution. The Warden ordered their release from administrative detention, restored the good time, and directed that each respondent's record carry a notation that "the incident not reflect unfavorably" upon consideration for parole. *Id.*, at 74, 77. The Warden refused, however, to expunge respondents' records. *Ibid.* Saxner and Cain were released into the general prison population on March 21.

Respondents next appealed to the Regional Director of the Bureau of Prisons. The Regional Director ruled that the disciplinary report, the action by the committee on the incident, and material relevant thereto were to be expunged from each respondent's record. *Id.*, at 79, 80. Thus, in the end, after these appeals, respondents obtained all the administrative relief they sought. But in the meantime, for a

definite interval, each had been condemned (improperly as it turned out) to "administrative detention."

Respondent Saxner was paroled and released in April 1975. Respondent Cain was granted parole in June and released in December.

Meanwhile, in March 1975, respondents brought suit in the United States District Court for the Southern District of Indiana against petitioners, the Terre Haute Warden, and the institution's administrative supervisor. Their third amended complaint alleged that the defendants had violated their rights under the First, Fourth, Fifth, Sixth, and Eighth Amendments. *Id.*, at 12. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). Respondents sought declaratory and injunctive relief and compensatory damages. App. 22.

The District Court granted petitioners' motion to dismiss the complaint on the ground that their functioning as hearing officers entitled them to absolute immunity. Nearly two years later, however, in April 1981, the District Court, on reconsideration, reinstated the suit in light of its controlling court's decision in *Mary* v. *Ramsden*, 635 F. 2d 590 (CA7 1980), where the Court of Appeals held that members of a disciplinary committee at a Wisconsin juvenile facility were entitled to only qualified immunity. App. 23.

The case then was tried to a jury. In response to special interrogatories, the jury found that petitioners had violated respondents' Fifth Amendment due process rights.[4] The jury awarded each respondent $1,500 compensatory damages against each petitioner, or a total of $4,500; each petitioner was thus subjected to liability totaling $3,000. *Id.*, at 9.

Petitioners' subsequent motion for judgment notwithstanding the verdict was denied. They appealed, contending,

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[4]Judgment was entered in favor of the defendant Warden and the defendant administrative supervisor. Respondents did not contest this aspect of the judgment on appeal.

among other things, that, as members of the discipline committee, they were entitled to absolute immunity.[5]

The United States Court of Appeals for the Seventh Circuit, by a divided vote, affirmed. *Saxner* v. *Benson*, 727 F. 2d 669 (1984). It held that petitioners' claim for absolute immunity was foreclosed by Seventh Circuit precedent denying such immunity to state correctional officers serving in a similar capacity. *Id.*, at 670. See *Redding* v. *Fairman*, 717 F. 2d 1105, 1117 (1983), cert. denied, 465 U. S. 1025 (1984); *Chavis* v. *Rowe*, 643 F. 2d 1281, 1288, cert. denied *sub nom. Boles* v. *Chavis*, 454 U. S. 907 (1981); *Mary* v. *Ramsden*, 635 F. 2d, at 600. Petitioners' request for rehearing en banc was denied by a vote of 5 to 4. App. to Pet. for Cert. 36a.

Because of the importance of the issue, and because the Seventh Circuit rulings, although consistent with *Jihaad* v. *O'Brien*, 645 F. 2d 556, 561 (CA6 1981), were claimed to be in some conflict with the en banc decision of the Fourth Circuit in *Ward* v. *Johnson*, 690 F. 2d 1098 (1982), we granted certiorari. 469 U. S. 1206 (1985).

II

A. This Court has observed: "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." *Pierson* v. *Ray*, 386 U. S. 547, 553–554 (1967). The Court specifically has pronounced and followed this doctrine of the common law for more than a century. In *Bradley* v. *Fisher*, 13 Wall. 335 (1872), it ruled that a federal judge may not be held accountable in damages for a judicial act taken within his court's jurisdiction. Such immunity applies "however erroneous the act may have been, and however injurious in its consequences it may have proved to

[5] The sole question raised by petitioners in this Court is whether, as committee members, they were entitled to absolute immunity. Petitioners state that they have not challenged—although they do not concede—the ruling that they violated "clearly established constitutional rights" of respondents. See Brief for Petitioners 7, n. 8.

the plaintiff." *Id.*, at 347. "Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed." *Ibid.* In *Pierson* v. *Ray*, *supra*, the Court held that absolute immunity shielded a municipal judge who was sued for damages under 42 U. S. C. § 1983 by clergymen who alleged that he had convicted them unconstitutionally for a peaceful protest against racial segregation. The Court stressed that such immunity was essential to protect the integrity of the judicial process. 386 U. S., at 554. And in *Stump* v. *Sparkman*, 435 U. S. 349 (1978), the Court once again enunciated this principle, despite any "informality with which [the judge] proceeded," and despite any *ex parte* feature of the proceeding. *Id.*, at 363, and n. 12.

With this judicial immunity firmly established, the Court has extended absolute immunity to certain others who perform functions closely associated with the judicial process. The federal hearing examiner and administrative law judge have been afforded absolute immunity. "There can be little doubt that the role of the modern federal hearing examiner or administrative law judge . . . is 'functionally comparable' to that of a judge." *Butz* v. *Economou*, 438 U. S. 478, 513 (1978). Full immunity also has been given to federal and state prosecutors. *Yaselli* v. *Goff*, 275 U. S. 503 (1927), aff'g 12 F. 2d 396 (CA2 1926); *Imbler* v. *Pachtman*, 424 U. S. 409, 424–426 (1976). The same is true for witnesses, including police officers, who testify in judicial proceedings. Witnesses are "integral parts of the judicial process" and, accordingly, are shielded by absolute immunity. *Briscoe* v. *LaHue*, 460 U. S. 325, 335 (1983). And the Court has noted the adoption in this country of the principle of immunity for grand jurors. See *Imbler* v. *Pachtman*, 424 U. S., at 423, n. 20. See also *Butz* v. *Economou*, 438 U. S., at 509–510.

Although this Court has not decided whether state parole officials enjoy absolute immunity as a matter of federal law, see *Martinez* v. *California*, 444 U. S. 277, 284 (1980), federal

appellate courts have so held. See, *e. g.*, *Sellars* v. *Procunier*, 641 F. 2d 1295, 1303 (CA9), cert. denied, 454 U. S. 1102 (1981); *Evans* v. *Dillahunty*, 711 F. 2d 828, 830–831 (CA8 1983); *United States ex rel. Powell* v. *Irving*, 684 F. 2d 494 (CA7 1982).

B. The Court has extended absolute immunity to the President when damages liability is predicated on his official act. *Nixon* v. *Fitzgerald*, 457 U. S. 731, 744–758 (1982). See *Harlow* v. *Fitzgerald*, 457 U. S. 800, 807 (1982). "For executive officials in general, however, our cases make plain that qualified immunity represents the norm." *Ibid.* See *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974) (State Governor and his aides); *Harlow* v. *Fitzgerald*, *supra* (Presidential aides); *Butz* v. *Economou*, *supra* (Cabinet member, acknowledging, however, that there are "those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business," 438 U. S., at 507); *Procunier* v. *Navarette*, 434 U. S. 555 (1978) (state prison officials); *Wood* v. *Strickland*, 420 U. S. 308 (1975) (school board members); *Pierson* v. *Ray*, *supra* (police officers). *Spalding* v. *Vilas*, 161 U. S. 483 (1896) (Postmaster General), and *Barr* v. *Matteo*, 360 U. S. 564 (1959) (Government officials), where full immunity was afforded, both antedated *Bivens*. In any event, "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." *Butz* v. *Economou*, 438 U. S., at 506; *Harlow* v. *Fitzgerald*, 457 U. S., at 808.

C. The Court has said that "in general our cases have followed a 'functional' approach to immunity law." *Id.*, at 810. "[O]ur cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant." *Briscoe* v. *LaHue*, 460 U. S., at 342. Absolute immunity flows not from rank or title or "location within the Government," *Butz* v. *Economou*, 438 U. S., at 511, but from the nature of the responsibilities of the individual official. And

in *Butz* the Court mentioned the following factors, among others, as characteristic of the judicial process and to be considered in determining absolute as contrasted with qualified immunity: (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal. *Id.*, at 512.

III

We turn to the application of these principles to the facts of the present case. Judge Cudahy of the Court of Appeals, in his separate concurring opinion, 727 F. 2d, at 673, stressed the *Butz* factors and was persuaded by what he felt were the absence of procedural safeguards, the rare and exceptional character of absolute immunity, and the need for such immunity only when public policy requires it. *Id.*, at 674–676.

Petitioners, in response, and seemingly in order to negate the significance of certain of the specified factors, point out that grand jury proceedings possess few procedural safeguards that are associated with court proceedings, and are largely immune from any type of judicial review. See, *e. g.*, *United States* v. *Calandra*, 414 U. S. 338, 345 (1974); *Costello* v. *United States*, 350 U. S. 359 (1956). Petitioners also observe that prosecutorial decisionmaking is not subject to the formalities of trials; instead, the prosecutor exercises broad and generally unreviewable discretion. Yet grand jurors and prosecutors enjoy absolute immunity. Petitioners finally argue that the Court's cases teach that absolute immunity shields an official if (a) the official performs an adjudicatory function comparable to that of a judge, (b) the function is of sufficient public importance, and (c) the proper performance of that function would be subverted if the offi-

cial were subjected to individual suit for damages. Brief for Petitioners 21.

When we evaluate the claim of immunity for the committee members, we bear in mind that immunity status is for the benefit of the public as well as for the individual concerned. *Pierson* v. *Ray*, 386 U. S., at 554. The committee members, in a sense, do perform an adjudicatory function in that they determine whether the accused inmate is guilty or innocent of the charge leveled against him; in that they hear testimony and receive documentary evidence; in that they evaluate credibility and weigh evidence; and in that they render a decision. We recognize, too, the presence of some societal importance in this dispute-resolution function. The administration of a prison is a difficult undertaking at best, for it concerns persons many of whom have demonstrated a proclivity for antisocial, criminal, and violent conduct. See *Hudson* v. *Palmer*, 468 U. S. 517, 526–527 (1984). We also acknowledge that many inmates do not refrain from harassment and intimidation. The number of nonmeritorious prisoners' cases that come to this Court's notice is evidence of this. Tension between prison officials and inmates has been described as "unremitting." *Wolff* v. *McDonnell*, 418 U. S. 539, 562 (1974). "Retaliation is much more than a theoretical possibility." *Ibid.* And we do not underestimate the fact, stressed by petitioners, that committee members usually are persons of modest means and, if they are suable and unprotected, perhaps would be disinclined to serve on a discipline committee. See *Ward* v. *Johnson*, 690 F. 2d, at 1108.

We conclude, nonetheless, that these concerns, to the extent they are well grounded, are overstated in the context of constitutional violations. We do not perceive the discipline committee's function as a "classic" adjudicatory one, as petitioners would describe it. Tr. of Oral Arg. 9–10. Surely, the members of the committee, unlike a federal or state judge, are not "independent"; to say that they are is to ignore reality. They are not professional hearing officers, as are

administrative law judges. They are, instead, prison officials, albeit no longer of the rank and file, temporarily diverted from their usual duties. See *Ward* v. *Johnson*, 690 F. 2d, at 1115 (dissenting opinion). They are employees of the Bureau of Prisons and they are the direct subordinates of the warden who reviews their decision. They work with the fellow employee who lodges the charge against the inmate upon whom they sit in judgment. The credibility determination they make often is one between a co-worker and an inmate. They thus are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee. See *Ponte* v. *Real*, 471 U. S. 491, 513 (1985) (dissenting opinion). It is the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance.

Neither do we equate this discipline committee membership to service upon a traditional parole board. The board is a "neutral and detached" hearing body. *Morrissey* v. *Brewer*, 408 U. S. 471, 489 (1972). The parole board member has been described as an impartial professional serving essentially "'as an arm of the sentencing judge.'" *Sellars* v. *Procunier*, 641 F. 2d., at 1302, n. 15, quoting *Bricker* v. *Michigan Parole Board*, 405 F. Supp. 1340, 1345 (ED Mich. 1975). And in the penalty context, the parole board is constitutionally required to provide greater due process protection than is the institution discipline committee. *Wolff* v. *McDonnell*, 418 U. S., at 561.

We relate this committee membership, instead, to the school board service the Court had under consideration in *Wood* v. *Strickland*, 420 U. S. 308 (1975). The school board members were to function as "adjudicators in the school disciplinary process," and they were to "judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations." *Id.*, at 319. Despite the board's adjudicative function of that extent, the Court concluded that the board members were to be protected by

only qualified immunity. After noting the suggestion of the presence of a deterrence-from-service factor, the Court concluded that "absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." *Id.*, at 320.

That observation and conclusion are equally applicable here. It is true, of course, that the "prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." *Ingraham* v. *Wright*, 430 U. S. 651, 669 (1977). But in *Ingraham* it was also said that even if schoolchildren and their parents do not have a prisoner's motive or proclivity to institute harassing lawsuits, they have "little need for the protection of the Eighth Amendment," for "the openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner." *Id.*, at 670. If qualified immunity is sufficient for the schoolroom, it should be more than sufficient for the jailhouse where the door is closed, not open, and where there is little, if any, protection by way of community observation.

Petitioners assert with some vigor that procedural formality is not a prerequisite for absolute immunity. They refer to well-known summary and *ex parte* proceedings, such as the issuance of search warrants and temporary restraining orders, and the setting of bail. And they sound a note of practicality by stating that recasting prison disciplinary tribunals in the mold of formal administrative bodies would be inimical to the needs of prison discipline and security. It is said that committee procedures fully comply with, and indeed exceed, what *Wolff* v. *McDonnell*, *supra*, requires, that they are sufficiently "judicial" to qualify for absolute immunity, and that *Wolff* "would be undone" as a practical matter if absolute immunity were not afforded. Brief for Petitioners 30.

In any event, it is asserted, committee proceedings contain ample safeguards to ensure the avoidance or correction of constitutional errors. Among these are the qualifications for committee service; prior notice to the inmate; representation by a staff member; the right to present certain evidence at the hearing; the right to be present; the requirement for a detailed record; the availability of administrative review at three levels (demonstrated by the relief obtained on review by these respondents at the first two levels); and the availability of ultimate review in federal court under 28 U. S. C. § 2241. Finally, it is said that qualified immunity would provide insufficient protection for committee members.

We are not persuaded. To be sure, the line between absolute immunity and qualified immunity often is not an easy one to perceive and structure. That determination in this case, however, is not difficult, and we readily conclude that these committee members fall on the qualified-immunity side of the line.

Under the Bureau's disciplinary policy in effect at the time of respondents' hearings, few of the procedural safeguards contained in the Administrative Procedure Act under consideration in *Butz* were present. The prisoner was to be afforded neither a lawyer nor an independent nonstaff representative. There was no right to compel the attendance of witnesses or to cross-examine. There was no right to discovery. There was no cognizable burden of proof. No verbatim transcript was afforded. Information presented often was hearsay or self-serving. The committee members were not truly independent. In sum, the members had no identification with the judicial process of the kind and depth that has occasioned absolute immunity.

Qualified immunity, however, is available to these committee members. That, we conclude, is the proper point at which to effect the balance between the opposing considerations. This less-than-absolute protection is not of small consequence. As the Court noted in *Butz*, 438 U. S., at

507–508, insubstantial lawsuits can be recognized and be quickly disposed of, and firm application of the Federal Rules of Civil Procedure "will ensure that federal officials are not harassed by frivolous lawsuits." *Id.*, at 508. All the committee members need to do is to follow the clear and simple constitutional requirements of *Wolff* v. *McDonnell*, *supra;* they then should have no reason to fear substantial harassment and liability. Qualified immunity has been widely imposed on executive officials who possess greater responsibilities. See, *e. g.*, *Scheuer* v. *Rhodes*, *Butz* v. *Economou*, *Harlow* v. *Fitzgerald*, all *supra*, and *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985). "[I]t is not unfair to hold liable the official who knows or should know he is acting outside the law, and . . . insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Butz* v. *Economou*, 438 U. S., at 506–507. See also *Barr* v. *Matteo*, 360 U. S., at 588–589 (BRENNAN, J., dissenting); *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S., at 411 (Harlan, J., concurring in judgment). See Gray, Private Wrongs of Public Servants, 47 Calif. L. Rev. 303, 339 (1959). Public policy has not dictated otherwise.

It is the business of prison officials, of course, to maintain order within their institutions. But this fact does not support a claim that every step taken to protect constitutional rights of prisoners will lead to a breakdown in institutional discipline and security. Routine and automatic arguments to this effect have been made before and have been rejected by this Court. See *Johnson* v. *Avery*, 393 U. S. 483, 486–487 (1969); *Lee* v. *Washington*, 390 U. S. 333, 334 (1968); *Ex parte Hull*, 312 U. S. 546 (1941).

We likewise are not impressed with the argument that anything less than absolute immunity will result in a flood of litigation and in substantial procedural burdens and expense for committee members. This argument, too, has been made before. But this Court's pronouncements in *Harlow*

v. *Fitzgerald*, 457 U. S., at 813–820, place the argument in appropriate perspective, for many cases may be disposed of without the necessity of pretrial discovery proceedings. Our experience teaches us that the vast majority of prisoner cases are resolved on the complaint alone. Of those prisoners whose complaints survive initial dismissal, few attempt discovery and fewer still actually obtain it. See Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610 (1979). And any expense of litigation largely is alleviated by the fact that a Government official who finds himself as a defendant in litigation of this kind is often represented, as in this case, by Government counsel. If the problem becomes acute, the Government has alternatives available to it: it might decide to indemnify the defendant official; Congress could make the claim a subject for the Federal Tort Claims Act; and Congress could even consider putting in place administrative law judges to preside at prison committee hearings.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE WHITE join, dissenting.

The Court concludes that the members of the Institution Discipline Committee of a federal prison are more like school board members than they are like administrative law judges or members of a parole board, and that therefore they are not entitled to absolute immunity from liability for damages. Concededly the hearings in which these officials perform their adjudicatory function do not include all of the procedural safeguards or the adherence to written precedent that surround the function of an administrative law judge, but I do not read *Butz* v. *Economou*, 438 U. S. 478 (1978), as making these factors dispositive against a claim for absolute immunity. I also think that the factors peculiar to the prison

environment counsel in favor of such an immunity for these officials.

Litigation before administrative law judges is generally conducted by lawyers, who are trained to suppress their dislike of, or contempt for, the particular judge before whom they try their case. The lawyers and their clients come from their homes and hotels to a government building in the morning, present their case to the judge, go and have lunch, return in the afternoon, and again present their case. When the court recesses for the day, the parties and their lawyers return to their homes and hotels. At least one side will be disappointed with the ultimate ruling of the judge, but there is little reason to think that they will bear personal animus or hostility toward the judge as a result of his decision.

Inside the prison walls, however, a considerably different atmosphere appears to obtain. A prisoner charged with a serious violation of prison regulations and threatened with administrative detention and loss of good time may have quite different emotions when appearing before the Institution Discipline Committee than does, for example, the plant manager of an employer charged with a violation of the National Labor Relations Act appearing before an administrative law judge. "Prison life, and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever-present potential for violent confrontation and conflagration." *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U. S. 119, 132 (1977).

Our observations in *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973), about the relationship between a State and its prisoners are equally applicable to the relationship between the Federal Government and its prisoners:

> "The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the

> State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State." *Id.*, at 492.

In *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), our first major decision applying the Due Process Clause of the Fourteenth Amendment to prison disciplinary proceedings, we said:

> "Prison disciplinary proceedings . . . take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life. . . . Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace. Relationships among the inmates are varied and complex and perhaps subject to the unwritten code that exhorts inmates not to inform on a fellow prisoner." *Id.*, at 561–562.

Not only may emotions run higher and tensions be exacerbated in the prison environment, but prisoners simply are not subject to many of the constraints which often deter members of the population at large from litigating at the drop of a hat. We have held, for example, that prisoners in confinement are entitled to free access to lawbooks or some other legal assistance. *Bounds* v. *Smith*, 430 U. S. 817 (1977). And the great majority of prisoners qualify for *in forma pauperis* status, which entitles them to relief from statutory

filing fees. With less to profitably occupy their time than potential litigants on the outside, and with a justified feeling that they have much to gain and virtually nothing to lose, prisoners appear to be far more prolific litigants than other groups in the population. And prisoners have made increasing use of § 1983 and *Bivens*-type suits in recent years: 18,856 such suits were filed in federal court in the year ending June 30, 1984, as compared to just 6,606 in 1975. Administrative Office of the United States Courts, Annual Report of the Director 143, Table 24 (1984).

In light of the foregoing, I think a slightly different balancing of the ledger is called for in the case of prison disciplinary officials than in the case of administrative law judges. The latter are surrounded by greater procedural protections for the litigants, and are governed by precedent. But the former operate in a far more volatile environment, are called upon to make decisions more quickly, and are much more likely to be the object of harassing litigation in the absence of absolute immunity. If in fact the administrative system set up by the government offers administrative relief from these officials' mistakes, and thereby permits the vindication of constitutional claims in this manner, I believe that the grant of absolute immunity meets the conditions set out in *Butz* v. *Economou*, 438 U. S. 478 (1978).

Here we need not look far for the availability or speed of administrative relief. Both respondents appeared before the Institution Discipline Committee on February 21, 1975. A few days later that committee issued its ruling, and respondents appealed to the Warden. On March 21, 1975, the Warden granted most of the relief requested, ordering respondents released from administrative segregation and restoring their forfeited good time. He also directed that their records carry a notation that the incident should not adversely affect their chances for parole. Respondents then appealed to the Regional Director of the Bureau of Prisons, who on April 11, 1975, granted respondents' final request

that all mention of the incident be expunged from their records. The entire administrative proceeding, from the day on which the hearing before the committee was held to the final ruling of the Regional Director granting respondents all of the relief requested, took less than two months.

In *Price* v. *Johnston*, 334 U. S. 266 (1948), we said that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Id.*, at 285. It requires no more than a commonsense application of this observation to the general principles laid down in *Butz*, *supra*, to conclude that the members of the Institution Discipline Committee are entitled to absolute immunity from liability for their decisions.

I respectfully dissent.

EASTERN AIR LINES, INC. *v.* MAHFOUD ON BEHALF OF MAHFOUD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 83–1807. Argued January 15, 1985—Reargued October 9, 1985—Decided December 10, 1985

729 F. 2d 777, affirmed by an equally divided Court.

Richard M. Sharp reargued the cause for petitioner. With him on the briefs were *Jeffrey C. Martin, Suzanne E. Meeker, Francis G. Weller,* and *Marc J. Yellin.*

George E. Farrell reargued the cause and filed a brief for respondent.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

JUSTICE BRENNAN took no part in the decision of this case.

**Juanita M. Madole* and *Donald W. Madole* filed a brief for Dina Avecilla et al. as *amici curiae* urging affirmance.

REGENTS OF THE UNIVERSITY OF MICHIGAN *v.* EWING

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84–1273. Argued October 8, 1985—Decided December 12, 1985

Respondent was enrolled in a 6-year program of study at the University of Michigan known as "Inteflex." An undergraduate degree and a medical degree are awarded upon successful completion of the program. To qualify for the final two years of the program a student must pass an examination known as "NBME Part I." Respondent was dismissed from the University when he failed this examination with the lowest score recorded in the history of the Inteflex program. After unsuccessfully seeking, from University authorities, readmission to the program and an opportunity to retake the examination, respondent brought suit in Federal District Court, alleging a right to retake the examination on the ground, *inter alia*, that he had a property interest in the Inteflex program and that his dismissal was arbitrary and capricious in violation of his "substantive due process rights" guaranteed by the Fourteenth Amendment. While determining that respondent had a constitutionally protected property interest in continued enrollment in the Inteflex program, the District Court found no violation of his due process rights. The Court of Appeals reversed.

Held: Even if respondent's assumed property interest gave rise to a substantive right under the Due Process Clause to continue enrollment free from arbitrary state action, the facts of record disclose no such action. The record unmistakably demonstrates that the decision to dismiss respondent was made conscientiously and with careful deliberation, based on an evaluation of his entire academic career at the University, including his singularly low score on the NBME Part I examination. The narrow avenue for judicial review of the substance of academic decisions precludes any conclusion that such decision was such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment. Pp. 222–228.

742 F. 2d 913, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court. POWELL, J., filed a concurring opinion, *post*, p. 228.

Roderick K. Daane argued the cause for petitioner. With him on the briefs was *Peter A. Davis*.

Michael M. Conway argued the cause for respondent. With him on the brief was *Mary K. Butler.**

JUSTICE STEVENS delivered the opinion of the Court.

Respondent Scott Ewing was dismissed from the University of Michigan after failing an important written examination. The question presented is whether the University's action deprived Ewing of property without due process of law because its refusal to allow him to retake the examination was an arbitrary departure from the University's past practice. The Court of Appeals held that his constitutional rights were violated. We disagree.

I

In the fall of 1975 Ewing enrolled in a special 6-year program of study, known as "Inteflex," offered jointly by the undergraduate college and the Medical School.[1] An undergraduate degree and a medical degree are awarded upon successful completion of the program. In order to qualify for the final two years of the Inteflex program, which consist of clinical training at hospitals affiliated with the University, the student must successfully complete four years of study including both premedical courses and courses in the basic medical sciences. The student must also pass the "NBME

*Briefs of *amici curiae* urging reversal were filed for the United States by *Acting Solicitor General Wallace, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller, Leonard Schaitman,* and *Freddi Lipstein;* for the American Council on Education et al. by *Eugene D. Gulland, Catherine W. Brown, Sheldon Elliot Steinbach,* and *Joseph Anthony Keyes, Jr.;* for the Curators of the University of Missouri et al. by *Marvin E. Wright* and *William F. Arnet;* and for Duke University et al. by *Robert B. Donin, Daniel Steiner, Eugene J. McDonald, Estelle A. Fishbein, Michael C. Weston,* and *Peter H. Ruger.*

Michael H. Gottesman, Robert M. Weinberg, Joy L. Koletsky, Laurence Gold, and *David M. Silberman* filed a brief for the National Education Association et al. as *amici curiae* urging affirmance.

Anne H. Franke and *Jacqueline W. Mintz* filed a brief for the American Association of University Professors as *amicus curiae.*

[1]The Inteflex program has since been lengthened to seven years.

Part I"—a 2-day written test administered by the National Board of Medical Examiners.

In the spring of 1981, after overcoming certain academic and personal difficulties, Ewing successfully completed the courses prescribed for the first four years of the Inteflex program and thereby qualified to take the NBME Part I. Ewing failed five of the seven subjects on that examination, receiving a total score of 235 when the passing score was 345. (A score of 380 is required for state licensure and the national mean is 500.) Ewing received the lowest score recorded by an Inteflex student in the brief history of that program.

On July 24, 1981, the Promotion and Review Board individually reviewed the status of several students in the Inteflex program. After considering Ewing's record in some detail, the nine members of the Board in attendance voted unanimously to drop him from registration in the program.

In response to a written request from Ewing, the Board reconvened a week later to reconsider its decision. Ewing appeared personally and explained why he believed that his score on the test did not fairly reflect his academic progress or potential.[2] After reconsidering the matter, the nine voting members present unanimously reaffirmed the prior action to drop Ewing from registration in the program.

In August, Ewing appealed the Board's decision to the Executive Committee of the Medical School. After giving Ewing an opportunity to be heard in person, the Executive Committee unanimously approved a motion to deny his appeal for a leave of absence status that would enable him to retake Part I of the NBME examination. In the following

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[2] At this and later meetings Ewing excused his NBME Part I failure because his mother had suffered a heart attack 18 months before the examination; his girlfriend broke up with him about six months before the examination; his work on an essay for a contest had taken too much time; his makeup examination in pharmacology was administered just before the NBME Part I; and his inadequate preparation caused him to panic during the examination.

year, Ewing reappeared before the Executive Committee on two separate occasions, each time unsuccessfully seeking readmission to the Medical School. On August 19, 1982, he commenced this litigation in the United States District Court for the Eastern District of Michigan.

II

Ewing's complaint against the Regents of the University of Michigan asserted a right to retake the NBME Part I test on three separate theories, two predicated on state law and one based on federal law.[3] As a matter of state law, he alleged that the University's action constituted a breach of contract and was barred by the doctrine of promissory estoppel. As a matter of federal law, Ewing alleged that he had a property interest in his continued enrollment in the Inteflex program and that his dismissal was arbitrary and capricious, violating his "substantive due process rights" guaranteed by the Fourteenth Amendment and entitling him to relief under 42 U. S. C. § 1983.

The District Court held a 4-day bench trial at which it took evidence on the University's claim that Ewing's dismissal was justified as well as on Ewing's allegation that other University of Michigan medical students who had failed the NBME Part I had routinely been given a second opportunity to take the test. The District Court described Ewing's unfortunate academic history in some detail. Its findings, set forth in the margin,[4] reveal that Ewing "encountered imme-

[3] A fourth count of Ewing's complaint advanced a claim for damages under 42 U. S. C. § 1983. The District Court held that the Board of Regents is a state instrumentality immunized from liability for damages under the Eleventh Amendment, and dismissed this count of the complaint. *Ewing* v. *Board of Regents*, 552 F. Supp. 881 (ED Mich. 1982).

[4] "In the fall of 1975, when Ewing enrolled in the program, he encountered immediate difficulty in handling the work and he did not take the final examination in Biology. It was not until the following semester that he completed this course and received a C. His performance in his other first semester courses was as follows: a C in Chemistry 120, a C in his writing course, and an incomplete in the Freshman Seminar. In the next se-

diate difficulty in handling the work," *Ewing* v. *Board of Regents*, 559 F. Supp. 791, 793 (1983), and that his difficulties—in the form of marginally passing grades and a number of

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mester he took Chemistry 220, a Freshman Seminar, and Psychology 504. He received a B in the Freshman Seminar, a C in Chemistry 220, but he withdrew from Psychology 504. He was advised at that time that he could not take the Patient Care Course, usually given during the fall of an Inteflex student's second year, and he was placed on an irregular program. Because of these difficulties, at the July 14, 1976 meeting of the Promotion and Review Board he requested a leave of absence, and when this was approved, he left the program.

"During the summer of 1976 while on leave, he took two Physics courses at Point Loma College in California. He reentered the Inteflex program at the University of Michigan in the winter 1977 term. In that term he repeated Chemistry 220 in which he received an A−. In the spring of 1977, he passed the Introduction to the Patient Care course.

"In the 1977–78 year, he completed the regular Year II program. But then he encountered new difficulty. In the fall of 1978 he received an incomplete in Clinical Studies 400, which was converted to a Pass; a B in Microbiology 420; and an incomplete in Gross Anatomy 507. The Gross Anatomy incomplete was converted to a C− by a make-up examination. During the winter of 1979 he received a C− in Genetics 505, a C in Microbiology 520, an E in Microanatomy and General Pathology 506, a B in Creative Writing, and a Pass in Clinical Studies 410. He appealed the Microanatomy and General Pathology grade, requesting a change from an E to a D, and a make-up exam to receive a Pass. His appeal was denied by the Grade Appeal Committee, and he was again placed on an irregular program; he took only the Clinical Studies 420 course in the spring 1979 semester.

"In July 1979, Ewing submitted a request to the Promotion and Review Board for an irregular program consisting of a course in Pharmacology in the fall and winter 1979–80 and a course in Human Illness and Neuroscience in 1980–81, thus splitting the fourth year into two years. The Board denied this request and directed him to take the fourth year curriculum in one academic year. He undertook to do so. He removed his deficiency in Microanatomy and General Pathology 506 by repeating the course during the winter 1980 semester and received a C+. In the spring term of 1980 he passed Developmental Anatomy with a B− grade, and he received a C grade in Neuroscience I 509 after a reexamination. In the fall of 1980, he received a passing grade in Neuroscience 609 and Pharmacology 626, and in the winter term of 1981, he received a passing grade in Clinical Studies

incompletes and makeup examinations, many experienced while Ewing was on a reduced course load—persisted throughout the 6-year period in which he was enrolled in the Inteflex program.

Ewing discounted the importance of his own academic record by offering evidence that other students with even more academic deficiencies were uniformly allowed to retake the NBME Part I. See App. 107–111. The statistical evidence indicated that of the 32 standard students in the Medical School who failed Part I of the NBME since its inception, all 32 were permitted to retake the test, 10 were allowed to take the test a third time, and 1 a fourth time. Seven students in the Inteflex program were allowed to retake the test, and one student was allowed to retake it twice. Ewing is the only student who, having failed the test, was not permitted to retake it. Dr. Robert Reed, a former Director of the Inteflex program and a member of the Promotion and Review Board, stated that students were "routinely" given a second chance. 559 F. Supp., at 794. Accord, App. 8, 30, 39–40, 68, 73, 163. Ewing argued that a promotional pamphlet released by the Medical School approximately a week before the examination had codified this practice. The pamphlet, entitled "On Becoming a Doctor," stated:

> "According to Dr. Gibson, everything possible is done to keep qualified medical students in the Medical School. This even extends to taking and passing National Board Exams. Should a student fail either part of the National Boards, an opportunity is provided to make up the failure in a second exam." *Id.*, at 113.

The District Court concluded that the evidence did not support either Ewing's contract claim or his promissory es-

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510 and a deficiency in Pharmacology 627. He was given a makeup examination in this course, and he received a 67.7 grade.

"He then took Part I of the NBME . . . ." *Ewing* v. *Board of Regents*, 559 F. Supp., at 793–794.

toppel claim under governing Michigan law. There was "no sufficient evidence to conclude that the defendants bound themselves either expressly or by a course of conduct to give Ewing a second chance to take Part I of the NBME examination." 559 F. Supp., at 800. With reference to the pamphlet "On Becoming A Doctor," the District Court held that "even if [Ewing] had learned of the pamphlet's contents before he took the examination, and I find that he did not, I would not conclude that this amounted either to an unqualified promise to him or gave him a contract right to retake the examination." *Ibid.*

With regard to Ewing's federal claim, the District Court determined that Ewing had a constitutionally protected property interest in his continued enrollment in the Inteflex program and that a state university's academic decisions concerning the qualifications of a medical student are "subject to substantive due process review" in federal court. *Id.*, at 798. The District Court, however, found no violation of Ewing's due process rights. The trial record, it emphasized, was devoid of any indication that the University's decision was "based on bad faith, ill will or other impermissible ulterior motives"; to the contrary, the "evidence demonstrate[d] that the decision to dismiss plaintiff was reached in a fair and impartial manner, and only after careful and deliberate consideration." *Id.*, at 799. To "leave no conjecture" as to his decision, the District Judge expressly found that "the evidence demonstrate[d] no arbitrary or capricious action since [the Regents] had good reason to dismiss Ewing from the program." *Id.*, at 800.

Without reaching the state-law breach-of-contract and promissory-estoppel claims,[5] the Court of Appeals reversed the dismissal of Ewing's federal constitutional claim. The

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[5] In a footnote, the Court of Appeals stated: "Because we believe this case can be disposed of on the Section 1983 claim, this Court does not expressly reach the breach of contract or promissory estoppel claims." *Ewing* v. *Board of Regents*, 742 F. 2d 913, 914, n. 2 (CA6 1984).

Court of Appeals agreed with the District Court that Ewing's implied contract right to continued enrollment free from arbitrary interference qualified as a property interest protected by the Due Process Clause, but it concluded that the University had arbitrarily deprived him of that property in violation of the Fourteenth Amendment because (1) "Ewing was a 'qualified' student, as the University defined that term, at the time he sat for NBME Part I"; (2) "it was the consistent practice of the University of Michigan to allow a qualified medical student who initially failed the NBME Part I an opportunity for a retest"; and (3) "Ewing was the only University of Michigan medical student who initially failed the NBME Part I between 1975 and 1982, and was not allowed an opportunity for a retest." *Ewing* v. *Board of Regents*, 742 F. 2d 913, 916 (CA6 1984). The Court of Appeals therefore directed the University to allow Ewing to retake the NBME Part I, and if he should pass, to reinstate him in the Inteflex program.

We granted the University's petition for certiorari to consider whether the Court of Appeals had misapplied the doctrine of "substantive due process."[6] 470 U. S. 1083 (1985). We now reverse.

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[6]The University's petition for certiorari also presented the question whether the Eleventh Amendment constituted a complete bar to the action because it was brought against the "Board of Regents of the University of Michigan," App. 13, a body corporate. Cf. *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U. S. 147 (1981) *(per curiam)*; *Alabama* v. *Pugh*, 438 U. S. 781 (1978) *(per curiam)*. After the petition was granted, however, respondent Ewing filed a motion to amend the complaint by joining the individual members of the Board of Regents as named defendants in their official capacities. The University did not oppose that motion. Tr. of Oral Arg. 12–13.

Granting the motion merely conforms the pleadings to the "course of proceedings" in the District Court. Cf. *Kentucky* v. *Graham*, 473 U. S. 159, 167, n. 14 (1985); *Brandon* v. *Holt*, 469 U. S. 464, 469 (1985). The record reveals that the Regents frequently referred to themselves in the plural, as "defendants," indicating that they understood the suit to be against them individually, in their official capacities, rather than against

III

In *Board of Curators, Univ. of Mo.* v. *Horowitz*, 435 U. S. 78, 91–92 (1978), we assumed, without deciding, that federal courts can review an academic decision of a public educational institution under a substantive due process standard. In this case Ewing contends that such review is appropriate because he had a constitutionally protected property interest in his continued enrollment in the Inteflex program.[7] But remembering Justice Brandeis' admonition not to "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (concurring opinion), we again conclude, as we did in *Horowitz*, that the precise facts disclosed by the record afford the most appropriate basis for

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the Board as a corporate entity. App. 11. Likewise, the District Court held that "defendants did not act in violation of Ewing's due process rights," 559 F. Supp., at 799, and accordingly found "in favor of the defendants," *id.*, at 800. We consequently grant the motion, thereby allowing Ewing to name as defendants the individual members of the Board of Regents in their official capacities. See *Patsy* v. *Florida Board of Regents*, 457 U. S. 496, 516, n. 19 (1982). Given our resolution of the case, we need not consider the question whether the relief sought by Ewing would be available under Eleventh Amendment principles.

[7] Ewing and the courts below reasoned as follows: In *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972), this Court held that property interests protected by due process are "defined by existing rules or understandings that stem from an independent source such as state law." See *Goss* v. *Lopez*, 419 U. S. 565, 572–573 (1975). In a companion case, *Perry* v. *Sindermann*, 408 U. S. 593, 601–602 (1972), we held that "agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances'" could be independent sources of property interests. See *Bishop* v. *Wood*, 426 U. S. 341, 344 (1976) (implied contracts). According to an antiquated race discrimination decision of the Michigan Supreme Court (whose principal holding has since been overtaken by events), "when one is admitted to a college, there is an implied understanding that he shall not be arbitrarily dismissed therefrom." *Booker* v. *Grand Rapids Medical College*, 156 Mich. 95, 99–100, 120 N. W. 589, 591 (1909). From the foregoing, Ewing would have us conclude that he had a protectible property interest in continued enrollment in the Inteflex program.

decision. We therefore accept the University's invitation to "assume the existence of a constitutionally protectible property right in [Ewing's] continued enrollment,"[8] and hold that even if Ewing's assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of record disclose no such action.

As a preliminary matter, it must be noted that any substantive constitutional protection against arbitrary dismissal would not necessarily give Ewing a right to retake the NBME Part I. The constitutionally protected interest alleged by Ewing in his complaint, App. 15, and found by the courts below, derives from Ewing's implied contract right to continued enrollment free from arbitrary dismissal. The District Court did not find that Ewing had any separate right to retake the exam and, what is more, explicitly "reject[ed] the contract and promissory estoppel claims, finding no sufficient evidence to conclude that the defendants bound themselves either expressly or by a course of conduct to give Ewing a second chance to take Part I of the NBME examination." 559 F. Supp., at 800. The Court of Appeals did not overturn the District Court's determination that Ewing lacked a tenable contract or estoppel claim under Michigan law,[9] see *supra*, at 220, and n. 5, and we accept its reason-

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[8] Tr. of Oral Arg. 3. Consistent with this suggestion, petitioner's answer to Ewing's complaint "admit[ted] that, under Michigan law, [Ewing] may have enjoyed a property right and interest in his continued enrollment in the Inteflex Program." App. 21.

[9] Although there is some ambiguity in its opinion, we understand the Court of Appeals to have found "clearly erroneous" the District Court's rejection of Ewing's federal substantive due process claim solely because of the "undisputed evidence of a consistent pattern of conduct"—namely, the "substantial and uncontroverted evidence in the trial record that at the time Ewing took the NBME Part I, medical students were routinely given a second opportunity to pass it." 742 F. 2d, at 915. The Court of Appeals found no "rule" to the effect that medical students are entitled to retake failed examinations. Indeed, it relied on the University's "promotional

able rendering of state law, particularly when no party has challenged it.[10]

The University's refusal to allow Ewing to retake the NBME Part I is thus not actionable in itself. It is, however, an important element of Ewing's claim that his dismissal was the product of arbitrary state action, for under proper analysis the refusal may constitute evidence of arbitrariness even

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pamphlet entitled 'On Becoming a Doctor'" only to the extent that it "memorialized the consistent *practice* of the medical school with respect to students who initially fail that examination." *Id.*, at 916 (emphasis added).

A property interest in a second examination, however, cannot be inferred from a consistent practice without some basis in state law. Yet in this case the Court of Appeals did not reverse the District Court's finding that Ewing was not even aware of the contents of the pamphlet and left standing its holding that the statements in this promotional tract did not "amoun[t] either to an unqualified promise to him or . . . a contract right to retake the examination" under state law. 559 F. Supp., at 800. We recognize, of course, that "mutually explicit understandings" may operate to create property interests. *Perry* v. *Sindermann*, 408 U. S., at 601. But such understandings or tacit agreements must support "a legitimate claim of entitlement" under "'an independent source such as state law . . . .'" *Id.*, at 602, n. 7 (quoting *Board of Regents* v. *Roth*, 408 U. S., at 577). The District Court, it bears emphasis, held that the University's liberal retesting custom gave rise to no state-law entitlement to retake the NBME Part I. We rejected an argument similar to Ewing's in *Board of Regents* v. *Roth*. In that case Dr. Roth asserted a property interest in continued employment by virtue of the fact that "of four hundred forty-two non-tenured professors, four were not renewed during [a particular] academic year." Brief for Respondent in *Board of Regents* v. *Roth*, O. T. 1971, No. 71–162, p. 28 (footnote and citation omitted). Absent a state statute or university rule or "anything approaching a 'common law' of reemployment," however, we held that Dr. Roth had no property interest in the renewal of his teaching contract. *Board of Regents* v. *Roth*, 408 U. S., at 578, n. 16.

[10] "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Propper* v. *Clark*, 337 U. S. 472, 486–487 (1949). Accord, *Haring* v. *Prosise*, 462 U. S. 306, 314, n. 8 (1983); *Leroy* v. *Great Western United Corp.*, 443 U. S. 173, 181, n. 11 (1979); *Butner* v. *United States*, 440 U. S. 48, 58 (1979); *Bishop* v. *Wood*, 426 U. S., at 345–347.

if it is not the actual legal wrong alleged. The question, then, is whether the record compels the conclusion that the University acted arbitrarily in dropping Ewing from the Inteflex program without permitting a reexamination.

It is important to remember that this is not a case in which the procedures used by the University were unfair in any respect; quite the contrary is true. Nor can the Regents be accused of concealing nonacademic or constitutionally impermissible reasons for expelling Ewing; the District Court found that the Regents acted in good faith.

Ewing's claim, therefore, must be that the University misjudged his fitness to remain a student in the Inteflex program. The record unmistakably demonstrates, however, that the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment.[11] Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. Cf. *Youngberg* v. *Romeo*, 457 U. S. 307, 323 (1982).

Considerations of profound importance counsel restrained judicial review of the substance of academic decisions. As JUSTICE WHITE has explained:

> "Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history;

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[11] "University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." *Board of Curators, Univ. of Mo.* v. *Horowitz*, 435 U. S. 78, 96, n. 6 (1978) (POWELL, J., concurring). See *id.*, at 90–92 (opinion of the Court).

> that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments. This is . . . only to underline Mr. Justice Black's constant reminder to his colleagues that the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable." *Moore* v. *East Cleveland*, 431 U. S. 494, 543–544 (1977) (WHITE, J., dissenting).

See *id.*, at 502 (opinion of POWELL, J.). Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, "a special concern of the First Amendment." *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603 (1967).[12] If a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," *Bishop* v. *Wood*, 426 U. S. 341, 349 (1976), far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Board of Curators, Univ. of Mo.* v. *Horowitz*, 435 U. S., at 89–90.

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[12] Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, see *Keyishian* v. *Board of Regents*, 385 U. S., at 603; *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957) (opinion of Warren, C. J.), but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself, see *University of California Regents* v. *Bakke*, 438 U. S. 265, 312 (1978) (opinion of POWELL, J.); *Sweezy* v. *New Hampshire*, 354 U. S., at 263 (Frankfurter, J., concurring in result). Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of "the four essential freedoms" of a university. *University of California Regents* v. *Bakke*, 438 U. S., at 312 (opinion of POWELL, J.) (quoting *Sweezy* v. *New Hampshire*, *supra*, at 263 (Frankfurter, J., concurring in result)) (internal quotations omitted).

This narrow avenue for judicial review precludes any conclusion that the decision to dismiss Ewing from the Inteflex program was such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment. Certainly his expulsion cannot be considered aberrant when viewed in isolation. The District Court found as a fact that the Regents "had good reason to dismiss Ewing from the program." 559 F. Supp., at 800. Before failing the NBME Part I, Ewing accumulated an unenviable academic record characterized by low grades, seven incompletes, and several terms during which he was on an irregular or reduced course load. Ewing's failure of his medical boards, in the words of one of his professors, "merely culminate[d] a series of deficiencies. . . . In many ways, it's the straw that broke the camel's back." App. 79. Accord, *id.*, at 7, 54–55, 72–73.[13] Moreover, the fact that Ewing was "qualified" in the sense that he was eligible to take the examination the first time does not weaken this conclusion, for after Ewing took the NBME Part I it was entirely reasonable for the faculty to reexamine his entire record in the light of the unfortunate results of that examination. Admittedly, it may well have been unwise to deny Ewing a second chance. Permission to retake the test might have saved the University the expense of this litigation and conceivably might have demonstrated that the members of the Promotion and Review Board misjudged Ewing's fitness for the medical profession. But it nevertheless remains true that his dismissal from the Inteflex program rested on an academic judgment that is not beyond

[13] Even viewing the case from Ewing's perspective, we cannot say that the explanations and extenuating circumstances he offered were so compelling that their rejection can fairly be described as irrational. For example, the University might well have concluded that Ewing's sensitivity to difficulties in his personal life suggested an inability to handle the stress inherent in a career in medicine. The inordinate amount of time Ewing devoted to his extracurricular essay writing may reasonably have revealed to the University a lack of judgment and an inability to set priorities.

the pale of reasoned academic decisionmaking when viewed against the background of his entire career at the University of Michigan, including his singularly low score on the NBME Part I examination.[14]

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, concurring.

Although I join the Court's opinion holding that respondent presents no violation of the substantive due process right that he asserts, I think it unnecessary to assume the existence of such a right on the facts of this case. Respondent alleges that he had a property interest in his continued enroll-

[14] Nor does the University's termination of Ewing substantially deviate from accepted academic norms when compared with its treatment of other students. To be sure, the University routinely gave others an opportunity to retake the NBME Part I. But despite tables recording that some students with more incompletes or low grades were permitted to retake the examination after failing it the first time, App. 105–111, and charts indicating that these students lacked the outside research and honor grade in clinical work that Ewing received, *id.*, at 119–120, we are not in a position to say that these students were "similarly situated" with Ewing. The Promotion and Review Board presumably considered not only the raw statistical data but also the nature and seriousness of the individual deficiencies and their concentration in particular disciplines—in Ewing's case, the hard sciences. The Board was able to take into account the numerous incompletes and makeup examinations Ewing required to secure even marginally passing grades, and it could view them in connection with his reduced course loads. Finally, it was uniquely positioned to observe Ewing's judgment, self-discipline, and ability to handle stress, and was thus especially well situated to make the necessarily subjective judgment of Ewing's prospects for success in the medical profession. The insusceptibility of promotion decisions such as this one to rigorous judicial review is borne out by the fact that 19 other Inteflex students, some with records that a judge might find "better" than Ewing's, were dismissed by the faculty without even being allowed to take the NBME Part I a first time. *Id.*, at 165–166. Cf. *id.*, at 66 (nine Inteflex students terminated after suffering one deficiency and failing one course after warning).

ment in the University's Inteflex program, and that his dismissal was arbitrary and capricious. The dismissal allegedly violated his substantive due process rights guaranteed by the Fourteenth Amendment, providing the basis for his claim under 42 U. S. C. § 1983.

I

As the Court correctly points out, respondent's claim to a property right is dubious at best. *Ante*, at 222, n. 7. Even if one assumes the existence of a property right, however, not every such right is entitled to the protection of substantive due process. While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972), substantive due process rights are created only by the Constitution.

The history of substantive due process "counsels caution and restraint." *Moore* v. *East Cleveland*, 431 U. S. 494, 502 (1977) (opinion of POWELL, J., for a plurality). The determination that a substantive due process right exists is a judgment that "'certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.'" *Ibid.*, quoting *Poe* v. *Ullman*, 367 U. S. 497, 543 (1961) (Harlan, J., dissenting). In the context of liberty interests, this Court has been careful to examine each asserted interest to determine whether it "merits" the protection of substantive due process. See, *e. g.*, *East Cleveland*, *supra*; *Roe* v. *Wade*, 410 U. S. 113 (1973); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). "Each new claim to [substantive due process] protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed." *Poe*, *supra*, at 544 (Harlan, J., dissenting).

The interest asserted by respondent—an interest in continued enrollment from which he derives a right to retake the NBME—is essentially a state-law contract right. It bears little resemblance to the fundamental interests that previ-

ously have been viewed as implicitly protected by the Constitution. It certainly is not closely tied to "respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms," *Griswold, supra*, at 501 (Harlan, J., concurring in judgment). For these reasons, briefly summarized, I do not think the fact that Michigan may have labeled this interest "property" entitles it to join those other, far more important interests that have heretofore been accorded the protection of substantive due process. Cf. *Harrah Independent School District* v. *Martin*, 440 U. S. 194 (1979).

II

I agree fully with the Court's emphasis on the respect and deference that courts should accord academic decisions made by the appropriate university authorities. In view of Ewing's academic record that the Court charitably characterizes as "unfortunate," this is a case that never should have been litigated. After a 4-day trial in a District Court, the case was reviewed by the Court of Appeals for the Sixth Circuit, and now is the subject of a decision of the United States Supreme Court. Judicial review of academic decisions, including those with respect to the admission or dismissal of students, is rarely appropriate, particularly where orderly administrative procedures are followed—as in this case.*

*See *Board of Curators, Univ. of Mo.* v. *Horowitz*, 435 U. S. 78, 96, n. 6 (1978) (opinion of POWELL, J.), cited *ante*, at 225, n. 11. See also *University of California Regents* v. *Bakke*, 438 U. S. 265, 312 (1978) (opinion of POWELL, J.) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment"); *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603 (1967).

UNITED STATES *v.* ROJAS-CONTRERAS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–1023. Argued October 9, 1985—Decided December 16, 1985

Respondent was indicted by a federal grand jury on February 18, 1983, for felony illegal entry into the United States and reentry by a deported alien, he having been previously convicted for illegal entry "on or about December 17, 1981." Appearing through counsel on February 18, 1983, respondent was arraigned, and the trial was set for April 19, 1983. When it was noticed that the date of the previous conviction was actually December 7, 1981, the grand jury, on April 15, 1983, returned a superseding indictment identical to the original except that it corrected the date of the previous conviction. Respondent then moved for a 30-day continuance of the trial, contending that 18 U. S. C. § 3161(c)(2)—which provides that a trial shall not commence less than 30 days "from the date on which the defendant first appears through counsel"—required a new 30-day trial preparation period following the return of the superseding indictment. The District Court denied the motion, and respondent was convicted. The Court of Appeals reversed, holding that respondent was entitled to the new 30-day trial preparation period.

Held: The Speedy Trial Act, of which § 3161(c)(2) is a part, does not require that the 30-day preparation period be restarted upon the filing of a superseding indictment. Pp. 234–237.

(a) That this was Congress' intention is evident from the unambiguous language of § 3161(c)(2) that clearly fixes the beginning point for the trial preparation period as the first appearance through counsel, and does not refer to the date of the indictment, much less the date of any superseding indictment. This conclusion is further supported by the language of § 3161(c)(1), which establishes the outside time limit within which a trial must commence and explicitly refers to the date of indictment as one of the relevant dates for determining that time limit. Pp. 234–235.

(b) The requirements of § 3161(c)(2) were met here, where the time between the date of respondent's first appearance through counsel and the date of the trial afforded a trial preparation period *twice* as long as the minimum required by § 3161(c)(2). P. 236.

(c) Respondent was clearly not prejudiced by the return of the superseding indictment, which did nothing except correct the date of the previous conviction. Pp. 236–237.

730 F. 2d 771, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, MARSHALL, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, in which BRENNAN, J., joined, *post*, p. 237.

Patty Merkamp Stemler argued the cause for the United States. With her on the briefs were former *Solicitor General Lee, Acting Solicitor General Fried, Assistant Attorney General Trott, Deputy Solicitor General Frey*, and *Joshua I. Schwartz*.

Judy Clarke, by appointment of the Court, 470 U. S. 1048, argued the cause and filed a brief for respondent.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict in the Circuits[1] as to whether (a) the Speedy Trial Act of 1974, 18 U. S. C. § 3161 *et seq.*, as amended, prohibits commencement of a trial less than 30 days after arraignment on a superseding indictment; and (b) assuming a violation of the Speedy Trial Act in this case, was that error harmless?

I

On December 7, 1981, respondent, who is not a citizen of the United States, was convicted of illegal entry into this country and was sentenced to one year's imprisonment. After serving his sentence, respondent returned to Mexico. Again, on February 13, 1983, he entered the United States illegally and was apprehended by United States Border

[1] Compare *United States* v. *Guzman*, 754 F. 2d 482 (CA2 1985), cert. pending, No. 84–1604; *United States* v. *Rush*, 738 F. 2d 497 (CA1 1984), cert. denied, 470 U. S. 1004 (1985); *United States* v. *Williford*, No. 83–1376 (CA5, Feb. 27, 1984) (unpublished opinion), cert. denied, 469 U. S. 893 (1984); *United States* v. *Horton*, 676 F. 2d 1165 (CA7 1982), cert. denied, 459 U. S. 1201 (1983); and *United States* v. *Todisco*, 667 F. 2d 255 (CA2 1981), cert. denied, 455 U. S. 906 (1982), with *United States* v. *Rojas-Contreras*, No. 83–5089 (CA9, Mar. 2, 1984) (case below; unpublished opinion). See also *United States* v. *Feldman*, 761 F. 2d 380 (CA7 1985).

Patrol agents. On February 18, 1983, a federal grand jury sitting in the Southern District of California returned a two-count indictment charging respondent with felony illegal entry under 8 U. S. C. § 1325 and with reentry by a deported alien under 8 U. S. C. § 1326. The indictment stated that the judgment of conviction for the prior illegal entry, which formed the predicate for the enhancement of the § 1325 offense to a felony, was "rendered on or about December 17, 1981." The date of the previous conviction was actually December 7, 1981. On February 18, 1983, respondent, appearing through counsel, was arraigned on the indictment. Trial was set for April 19, 1983.

On March 21, 1983, the Government informed respondent of the correct date of the previous conviction, and on April 15, 1983, the grand jury returned a superseding indictment which was identical with the original indictment in all respects except that it stated that the date of the previous conviction was "on or about December 7, 1981."[2] Respondent was arraigned on the superseding indictment on April 18, 1983.

Later that day at a pretrial conference, respondent's counsel moved for a 30-day continuance of the trial scheduled to begin the next day contending that the Speedy Trial Act, as construed by the Court of Appeals for the Ninth Circuit in *United States* v. *Arkus*, 675 F. 2d 245 (1982), required that a new 30-day trial preparation period be granted following the return of a superseding indictment.[3] The District Court denied respondent's motion for a 30-day continuance, citing the Seventh Circuit's decision in *United States* v. *Horton*, 676

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[2] The record does not disclose why the indictment was not corrected by a motion for amendment in the District Court.

[3] Respondent's counsel also argued that he needed the additional time to consult a fingerprint expert and to review respondent's immigration file. However, the ultimate fact to which such evidence related, *i. e.*, that respondent and the person arrested in 1981 were one and the same, was ultimately stipulated to by respondent.

F. 2d 1165 (1982), and distinguishing *Arkus*. Respondent was convicted of felony illegal entry into the United States.

The Court of Appeals reversed, holding that under its decision in *United States* v. *Harris*, 724 F. 2d 1452 (CA9 1984), which in turn relied on its decision in *Arkus*, respondent was entitled to a new 30-day trial preparation period following his arraignment on the superseding indictment. Citing its decision in *United States* v. *Daly*, 716 F. 2d 1499 (CA9 1983), the Court of Appeals held that reversal of respondent's conviction was required to remedy the Speedy Trial Act violation because "any pretrial preparation period shorter than thirty days is inadequate *per se*. No showing of prejudice is required."

We granted certiorari, 469 U. S. 1207 (1985). We reverse.

II

Our starting point, of course, is the language of the statute. The Speedy Trial Act of 1974, as amended in 1979, 18 U. S. C. §3161 *et seq.*, establishes inside and outside time limits for commencing trial in criminal cases. Section 3161(c)(2), the provision at issue in this case, provides:

> "Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days *from the date on which the defendant first appears through counsel* or expressly waives counsel and elects to proceed pro se" (emphasis added).

The statute clearly fixes the beginning point for the trial preparation period as the first appearance through counsel. It does not refer to the date of the indictment, much less to the date of any superseding indictment. Given this unambiguous language, we have no choice but to conclude that Congress did not intend that the 30-day trial preparation period begin to run from the date of filing of a superseding indictment.

That conclusion finds additional support in the language of § 3161(c)(1). That section establishes the outside time limit within which trial must commence under the Act and explicitly refers to the date of the indictment as one of the relevant dates for determining that time limit:

> "[T]he trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days *from the filing date (and making public) of the information or indictment*, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs" (emphasis added).

It is clear that Congress knew how to provide for the computation of time periods under the Act relative to the date of an indictment. Had Congress intended that the 30-day trial preparation period of § 3161(c)(2) commence or recommence on such a date, it would have so provided.

Because the language of § 3161(c)(2) is a clear expression of congressional intent, we need not resort to the legislative history of that section. We note, however, that the legislative history is wholly consistent with our reading of that section. The 30-day trial preparation period was not included in the original Speedy Trial Act as it was enacted in 1975 but was incorporated into the Act with the 1979 amendments to the Act. Speedy Trial Act Amendments Act of 1979, Pub. L. 96–43, 93 Stat. 327. The legislative history of the 1979 revisions suggests that the source of the 30-day trial preparation period was a set of Guidelines issued by the Judicial Council of the United States Court of Appeals for the Second Circuit. See Hearings on S. 961 and S. 1028 before the Senate Committee on the Judiciary, 96th Cong., 1st Sess., 122, 386–436 (1979). The Guidelines were issued to assist the trial judges sitting in the Second Circuit in interpreting the provisions of the Act. *Id.*, at 386. These Guidelines provided that "whenever the time between arraignment and the scheduled trial date does not exceed thirty (30) days,

the Court shall . . . view a request for an adjournment of trial to a date beyond thirty (30) days but within the sixty (60) day limit, liberally . . . ." *Id.*, at 392–393. The Guidelines also stated that, in the situation where a superseding indictment adds new charges, trial of the original charges must begin "within the time limit for commencement of trial on the original indictment or information." *Id.*, at 417. Taking these two statements from the Guidelines together, it appears that, although the Second Circuit was clearly concerned that a defendant be given a pretrial preparation period of at least 30 days, the filing of a superseding indictment was not enough by itself to require the restarting of that 30-day period.

Applying § 3161(c)(2) to the facts of this case, we conclude that the requirements of that section were met here. The record reflects that respondent's first appearance through counsel occurred on February 18, 1983. Trial was not commenced until April 19, 1983. Respondent was, therefore, afforded a pretrial preparation period *twice* as long as the minimum required by § 3161(c)(2).

In concluding as we do that the Act does not require that the 30-day trial preparation period be restarted upon the filing of a superseding indictment, we do not hold that a defendant must always be compelled to go to trial less than 30 days after the filing of such an indictment. The Act itself places broad discretion in the District Court to grant a continuance when necessary to allow further preparation. Section 3161(h)(8) authorizes the trial judge to grant a continuance if "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." The authority of the District Court to grant an "ends of justice" continuance should take care of any case in which the Government seeks a superseding indictment which operates to prejudice a defendant.

Here respondent was clearly not prejudiced by the return of the superseding indictment. The initial indictment recited that the judgment on the prior illegal entry had been

rendered "on or about December 17, 1981." The superseding indictment did nothing except to correct that phrase to read "on or about December 7, 1981." Even if we were prepared to hold that December 7 is not "on or about" December 17, we would nevertheless be compelled to conclude that respondent was not prejudiced by the change.

Since the Act did not prohibit the commencement of the trial less than 30 days after arraignment on the superseding indictment, we need not address the question whether the District Court's refusal to grant the continuance requested by respondent was harmless error.

The Court of Appeals' construction of the Act ignored its plain language and would frustrate its basic purpose which is manifest in its very title: The speedy trial of criminal cases. That construction was error, and we reverse.

Reversed.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, concurring in the judgment.

I concur in the result the Court reaches and therefore in its judgment. The Court today holds that the Speedy Trial Act does not mandate a new 30-day defense-preparation period following return of a superseding indictment. I agree with the Court that that holding is strongly guided by the express purpose of the Speedy Trial Act. But because I find neither the language of the Act particularly clear nor its legislative history at all helpful, I refrain from joining the opinion's statutory analysis.

The term "superseding indictment" refers to a second indictment issued in the absence of a dismissal of the first. The Act nowhere refers to a superseding indictment, and seems to assume that dismissal of the first indictment will precede issuance of the second. See 18 U. S. C. §§ 3161(d)(1) and 3161(h)(6). Section 3161(c)(2), which establishes the 30-day defense-preparation period "from the date on which the defendant first appears through counsel," therefore can provide only the starting point of the inquiry. The question

before the Court is whether that language may be interpreted to refer to the defendant's appearance on the indictment upon which he ultimately goes to trial, or whether one must read that language to refer to the defendant's appearance on the first indictment. Despite the fact that the legislative history of the Act is of no assistance,[1] we are guided in our task by the purpose and the structure of the Act.

The Speedy Trial Act "gave effect to a Federal defendant's right to speedy trial under the Sixth Amendment and acknowledged the danger to society represented by accused persons on bail for prolonged periods of time." H. R. Rep. No. 96–390, p. 3 (1979). To accomplish these goals, the Act provides strict time limits for each stage of the criminal trial process. The Act, as amended, requires that a defendant be brought to trial within 70 days of his first appearance through

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[1] As the Court observes, *ante*, at 235, the notion that the Act might operate to deny defendants the necessary time adequately to prepare for trial had its genesis in the Guidelines issued by the Judicial Council of the United States Court of Appeals for the Second Circuit (Guidelines). See Hearings on S. 961 and S. 1028 before the Senate Committee on the Judiciary, 96th Cong., 1st Sess., 122, 386–436 (1979) (Hearings). However, in enacting the 1979 amendments, Congress did not adopt the Second Circuit's Guidelines; in fact, Congress rejected the Guidelines' *discretionary* grant of a defense-preparation period, opting instead for a *mandatory* 30-day period. In light of this fundamental difference between the Act and the Guidelines, the latter's details can provide little help for today's decision. In any event, the Guidelines do not answer the question before us. Under them, where a superseding indictment contains charges not included in the original indictment, trial of the original charges must begin "within the time limit for commencement of trial on the original indictment or information." Hearings, at 417. This language plainly instructs that *as to the original charges* contained in a superseding indictment, no new 30-day and 70-day periods begin to run. *As to any new charges*, however, the Guidelines at least suggest that the clock for the 70-day time to trial must be restarted. *Ibid.* It is not obvious under the Guidelines whether a modified charge of the sort before us today would be treated the same as the original charge, and the Guidelines are silent on the question whether to accord the defendant the opportunity to seek an additional discretionary preparation period where the 70-day period ran anew.

counsel. See 18 U. S. C. § 3161(c)(1). For 30 of those days, the Government cannot proceed to trial, in order that the defendant may prepare his case.

Because the criminal process does not always proceed in a linear fashion, the Act addresses second indictments that occur, unlike in this case, following dismissal of the first indictment. When an indictment is dismissed on motion of the defendant, and the defendant is thereafter reindicted, both the 30-day and 70-day periods run anew. See 18 U. S. C. § 3161(d)(1). In contrast, however, when an indictment is dismissed on motion of the Government, and the defendant is thereafter reindicted, both the 30-day and 70-day periods continue to run from the first indictment, with the proviso that the period during which no indictment is outstanding is excluded from the 70-day calculation. See 18 U. S. C. § 3161(h)(6). The difference in treatment protects against governmental circumvention of the speedy-trial guarantee.

Neither of these reindictment provisions applies here, because the second indictment was issued in the absence of dismissal of the first. The provisions demonstrate, however, that the 30-day and 70-day periods were intended to operate in tandem; where one runs anew, so should the other. In this case, therefore, the structure of the statute suggests that either both periods should continue to run upon issuance of a superseding indictment, or both should start anew. To permit a new 30-day period, but not a new 70-day period, could lead to a result surely not intended by Congress, namely, that there is no day on which a defendant could be brought to trial. To avoid that possibility, respondent argues that the second 30-day period could simply be excluded from the continuing 70-day period in which a defendant must be brought to trial. But the Act's comprehensive list of express exclusions counsels one to read Congress' failure to exclude certain periods of time as a considered judgment that those periods are to be included in the speedy-trial

calculation, or as a recognition that the need for such an exclusion will not arise under the statutory scheme.

In light of Congress' intent to bring defendants quickly to trial, it would make little sense to restart both the 30-day and 70-day periods whenever there is a superseding indictment. Frequently, a superseding indictment is used to drop charges or parties or, as here, to make a minor correction, leaving the charges and the evidence necessary to defend against them unaffected. These kinds of changes should not create a need for further preparation time; indeed, in some instances, superseding indictments may lessen the defense burden. Where a superseding indictment of this type is issued, the Court's holding today permits the defendant to be brought to trial without unnecessary delay.

Like the Court, I fully recognize that a superseding indictment may add to a defendant's burden in preparing for trial. In the event of additional charges, or of material changes, a defendant well may need additional preparation time. Under the Act, a defendant then may seek an "ends of justice" continuance, to be granted in the discretion of the trial court.[2] See 18 U. S. C. §3161(h)(8)(A). This continuance is available whether the need for additional time is occasioned by a superseding indictment or otherwise. Indeed, the 1979 amendments to the Speedy Trial Act not only mandated the 30-day defense-preparation period, but also provided that one basis for granting a continuance is if "the failure to grant such a continuance . . . would deny counsel for the defendant . . . the reasonable time necessary for effective preparation." 18 U. S. C. §3161(h)(8)(B)(iv). The constitutional right to assistance of counsel is rendered meaningless if a defendant is forced to trial in the absence of adequate time to prepare. To avoid prejudicing a defendant, a continuance should be

[2] Because time granted under an "ends of justice" continuance is expressly excluded from the 70-day period, any preparation time granted would not jeopardize the Government's ability to bring the defendant to trial. See 18 U. S. C. §3161(h)(8)(A).

granted where there is a meaningful possibility that a superseding indictment will require an alteration or adjustment in the planned defense. Trial courts should bear in mind that counsel may require time fully to analyze the impact of the superseding indictment, and to explore any options it presents or precludes.[3]

The Speedy Trial Act assures that defendants will be brought to trial quickly, but without undermining the Constitution's guarantee of effective assistance of counsel. Because the Court's holding today upholds that essential promise of the Act, I concur in the judgment.

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[3] Following enactment of the 1979 amendments, the Committee on the Administration of the Criminal Law recommended precisely this analysis. The Committee advised district courts that, in the event of a superseding indictment, the 30-day preparation period should not run anew, but "the trial court should use its scheduling discretion to ensure that the defense has time to prepare in the circumstances of the particular case." See Judicial Conference of the United States, Committee on the Administration of the Criminal Law, Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended, p. 14 (1981).

UNITED STATES *v.* VON NEUMANN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–1144. Argued November 4, 1985—Decided January 14, 1986

Respondent purchased a car in Switzerland and had it shipped to Vancouver, Canada. After he had picked up the car in Vancouver, he drove to the United States border but failed to declare the car when asked by a United States customs officer whether he had anything to declare. Customs then seized the car pursuant to 19 U. S. C. § 1497, which provides that any article not declared upon entry into the United States that by law must be declared is subject to forfeiture or to a penalty equaling the value of the article. Respondent, rather than waiting to challenge the seizure in a judicial forfeiture action that might be initiated by the Government, immediately chose the other statutory option of filing a petition for administrative remission of the forfeiture. Two weeks later he posted a bond for $24,500, the car's value, and Customs released the car. The Customs Service did not respond to the remission petition until 36 days after it was filed, at which time the penalty for failure to declare the car was reduced to $3,600, and this penalty was upheld on administrative review. Respondent then filed a complaint in Federal District Court, seeking cancellation of the penalty on the ground that he had not violated § 1497, and a declaration that the seizure and penalty were unlawful. The District Court disagreed and entered judgment for the Government. The Court of Appeals held that the 36-day delay in acting on respondent's remission petition denied him due process of law in violation of the Fifth Amendment. Subsequently on remand from this Court for reconsideration in light of *United States* v. *$8,850*, 461 U. S. 555, the Court of Appeals held that the four-factor balancing test of *Barker* v. *Wingo*, 407 U. S. 514—the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice suffered by the defendant—applied in *$8,850* in determining whether a delay in bringing a forfeiture proceeding violated due process should also be applied to determine whether the 36-day delay in this case violated due process, and accordingly remanded to the District Court to determine that question under the above test.

Held: On the record, the 36-day delay did not deprive respondent of property without due process of law. Pp. 249–251.

(a) Respondent's right to a forfeiture proceeding meeting the *Barker* test provides the postseizure hearing required by due process to protect respondent's property interest in the car. The remission statute simply

grants the Secretary of the Treasury the discretion not to pursue a complete forfeiture despite the Government's entitlement to one. Remission proceedings are not *necessary* to a forfeiture determination, and therefore are not constitutionally required. Thus, there is no constitutional basis for a claim that respondent's interest in the car, or in the money put up to secure the bond, entitled him to a speedy answer to his remission petition. Pp. 249–250.

(b) Even if respondent had a property right under the remission statute that cannot be taken away without due process that includes a speedy answer to the remission petition, any due process requirement of timely disposition was more than adequately provided for here. It is not shown that he suffered any prejudice from the 36-day delay. Pp. 250–251.

729 F. 2d 657, reversed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and in Parts I and II of which BURGER, C. J., joined. BURGER, C. J., filed an opinion concurring in part, *post*, p. 251. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 252.

Alan I. Horowitz argued the cause for the United States. With him on the brief were *Acting Solicitor General Fried*, *Assistant Attorney General Trott*, and *Deputy Solicitor General Frey*.

Charles L. Birke argued the cause and filed a brief for respondent.

JUSTICE BRENNAN delivered the opinion of the Court.

We must decide in this case whether a 36-day delay by the United States Customs Service in responding to a remission petition filed by respondent in response to the seizure of his car by customs agents deprived respondent of property without due process of law.

I

Title 19 U. S. C. § 1497[1] provides that any article not declared upon entry into the United States which by law

[1] Section 497, 46 Stat. 728, 19 U. S. C. § 1497, provides:

"Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written

must be declared is subject to forfeiture or to a penalty equaling the value of the article. After seizure of an article by the United States Customs Service, a claimant to it has essentially two options. He may pursue an administrative remedy under 19 U. S. C. § 1618 (1982 ed., Supp. III),[2] which vests in the Secretary of the Treasury the discretionary authority to mitigate or remit the penalty or forfeiture, or he may challenge the seizure in a judicial forfeiture action initiated by the Government.[3] 19 U. S. C. §§ 1602–1604.[4]

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declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article."

[2] Section 618, 46 Stat. 757, as amended and set forth in 19 U. S. C. § 1618 (1982 ed., Supp. III), provides in pertinent part:

"Whenever any person interested in any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws . . . before the sale of such vessel, vehicle, aircraft, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury . . . if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto."

[3] The claimant may trigger the Government's initiation of forfeiture proceedings. In *United States* v. *$8,850*, 461 U. S. 555, 569 (1983), we noted:

"A claimant is able to trigger rapid filing of a forfeiture action if he desires it. First, the claimant can file an equitable action seeking an order compelling the filing of the forfeiture action or return of the seized property. See *Slocum* v. *Mayberry*, 2 Wheat. 1, 10 (1817) (Marshall, C. J.). Less formally, the claimant could simply request that the Customs Service refer the matter to the United States Attorney. If the claimant believes the initial seizure was improper, he could file a motion under Federal Rule of Criminal Procedure 41(e) for a return of the seized property."

[4] When the Jaguar was seized in this case, a customs officer could have instituted nonjudicial, summary forfeiture proceedings if the value of the car had been not more than $10,000. See 19 U. S. C. §§ 1607–1609. Congress has since raised this limit to $100,000. 19 U. S. C. § 1607 (1982 ed.,

In 1974, respondent John Von Neumann shipped to Vancouver, Canada, a 1974 Jaguar Panther automobile he purchased in Switzerland. On January 20, 1975, he and a friend picked up the car in Vancouver, obtained a release from Canadian Customs to take possession of the vehicle and also obtained a form that Von Neumann was to deliver to the Canadian Customs station at the border. Von Neumann failed to deliver the form to Canadian Customs officials. He claimed that he inadvertently drove past the Canadian Customs station because of poor visibility and inadequate directions. Instead, Von Neumann and his friend arrived at the United States border checkpoint at Blaine, Washington, where they were questioned by United States Immigration Officer Harry Perkins, a designated customs officer. Canadian Customs officials had earlier alerted United States Customs that Von Neumann's car would be crossing the border, and Perkins specifically asked Von Neumann whether he had anything to declare. When Von Neumann failed to declare the automobile, Perkins asked him into the checkpoint station and referred the matter to Customs Inspector Donald E. Morrison. Upon being asked why he had not declared the car, Von Neumann explained that he did not think a declaration was required. Morrison then seized the car pursuant to 19 U. S. C. § 1497.

That same day, January 20, Von Neumann prepared a "Petition for Remission or Mitigation of Forfeitures and Penalties Incurred," pursuant to 19 U. S. C. § 1618, explaining that he had not intended to violate United States Customs laws when he failed to declare the car. Two weeks later, on February 3, Von Neumann posted a bond for $24,500, the

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Supp. III). Even for a seizure of property appraised at less than $100,000, the claimant has a right to a judicial determination upon posting a bond to cover costs in the sum of $2,500 or 10% of the value of the claimed property, whichever is smaller, but not less than $250. 19 U. S. C. § 1608 (1982 ed., Supp. III).

value of his car, and Customs released the vehicle pursuant to its authority under 19 U. S. C. § 1614. On February 12, counsel for Von Neumann filed a supplement to the original remission petition. On February 25—36 days after the petition was filed—the Seattle District Director of the Customs Service, pursuant to delegation of authority from the Secretary of the Treasury,[5] acted on Von Neumann's remission petition, and informed Von Neumann that the penalty for failure to declare the car was being reduced to $3,600. On administrative review of this determination, the Regional Commissioner of Customs in San Francisco, on April 14, 1975, upheld the $3,600 penalty.

Having exhausted his administrative remedies, Von Neumann filed a complaint in the United States District Court for the Central District of California. He sought cancellation of the $3,600 penalty on the ground that he had not violated § 1497. He also requested an injunction prohibiting Customs from placing his name on a computer list of violators, and a declaration that this seizure and penalty were unlawful. The District Court found that Von Neumann had violated 19 U. S. C. § 1497, and that seizure of the car therefore was proper. The court also upheld the validity of the remission and mitigation procedures. Accordingly, it entered judgment for the Government.[6] Von Neumann appealed this de-

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[5] The Secretary of the Treasury is authorized by statute to act on petitions for remission. 19 U. S. C. § 1618. This authority has been delegated to District Directors of the Customs Service in some cases where the total value of the merchandise forfeited does not exceed $100,000, 19 CFR § 171.21 (1985). At the time of this seizure, the limit was $25,000. See 19 CFR § 171.21 (1974).

[6] The Government filed a contingent counterclaim seeking recovery of the full $24,500 in accordance with 19 U. S. C. § 1497, in the event the District Court found the mitigation invalid. Because the District Court entered judgment in favor of the Government on the merits of Von Neumann's complaint, it denied the contingent counterclaim. In its answer in the District Court the Government had also contended that the remission and mitigation sought and received by respondent was a settle-

cision, challenging both the procedures followed by Customs in imposing the penalty and also the penalty itself.

The Court of Appeals for the Ninth Circuit agreed with the District Court that Von Neumann had violated § 1497. 660 F. 2d 1319, 1323 (1981). The court, however, also considered and sustained Von Neumann's claim that the 36-day delay in acting on his remission petition denied Von Neumann due process of law in violation of the Fifth Amendment. The court reasoned that speed in the handling of the remission petition, particularly where the seizure is of an automobile, is constitutionally required—that strict guidelines in responding to remission petitions are necessary "to ensure the due process rights of administrative claimants," *id.*, at 1326–1327, and concluded that Customs must "act on a petition for remission or mitigation within 24 hours of receipt," *id.*, at 1327. In addition, the court ruled, a claimant has a right to a personal appearance to present his or her claim. *Ibid.*

The Government petitioned for certiorari. We granted the petition, vacated, and remanded for reconsideration in light of *United States* v. *$8,850*, 461 U. S. 555 (1983). 462 U. S. 1101 (1983). In *$8,850*, however, the issue presented did not involve the remission procedure; rather the question was whether the Government's 18-month delay in bringing a *forfeiture* proceeding violated the claimant's right to due process of law. The Court held that due process requires a postseizure determination within a reasonable time of the seizure. We concluded that the four-factor balancing test of *Barker* v. *Wingo*, 407 U. S. 514 (1972), provides the relevant framework for determining whether a delay was reasonable. The *Barker* test involves a weighing of four factors: the length of any delay, the reason for the delay, the defendant's assertion of his right, and prejudice suffered by the defendant. Applying this test to the 18-month delay before it, the

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ment, accord, and satisfaction binding on Von Neumann. The District Court did not reach this issue; nor do we.

Court in *$8,850* found no unreasonable delay, in part because a substantial portion of the delay in question was attributable to pending administrative and criminal proceedings.

On remand in this case, the Court of Appeals recognized that *$8,850* "presented a somewhat different issue from that arising in the instant case," 729 F. 2d 657, 659 (1984), because *$8,850* dealt with forfeiture rather than the remission procedure. Nevertheless, it concluded that this Court's holding in *$8,850* "reinforces our earlier view that due process rights attach to the processing of the petition for remission," 729 F. 2d, at 660, and therefore reaffirmed its holding that "due process requires Customs to act promptly in ruling on petitions for remission or mitigation under 19 U. S. C. § 1618." *Ibid.* The court recognized that its earlier attempt to set specific time limits for the processing of remission petitions was "ill-advised," *ibid.*, and held instead that the *Barker* factors should also be applied to determine whether Customs has violated due process in delaying a response to a remission petition. The court accordingly remanded the case to the District Court to consider whether the 36-day delay violated due process. In addition, however, the court made clear its view that the circumstances of this case support a finding of a due process violation. Thus, the court noted that the propriety of the length of the delay may turn on the nature of the item that has been seized, and reemphasized the point made in its earlier opinion that "special hardships [are] imposed on persons deprived of the use of their automobiles . . . ." 729 F. 2d, at 661. With respect to the reason for the delay, the Court of Appeals observed that the "record here provides no obvious reason for the Government's one-month delay in processing von Neumann's petition, although we note that Customs processes a great number of petitions each year." *Ibid.* In addition, the court pointed to the filing of the remission petition itself as the necessary assertion of the right to a speedy determination under *Barker*. Finally, the court

noted that prejudice could be established by the inconvenience of being without a vehicle for any length of time.

Arguing that due process considerations do not govern the Secretary's disposition of remission petitions, the Government petitioned for certiorari. We granted the Government's petition. 471 U. S. 1064 (1984). We now reverse.

II

We understand respondent to argue that his property interest in his car gives him a constitutional right to a speedy disposition of his remission petition without awaiting a forfeiture proceeding. We disagree. Implicit in this Court's discussion of timeliness in *$8,850* was the view that the forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect Von Neumann's property interest in the car.[7] Respondent argues, however, that "[t]he petition for remission procedure is just one step in which it is determined whether that property interest will be extinguished via a judicial foreclosure proceeding." Brief for Respondent 8–9. We think respondent misunderstands the remission procedure's role. It is true that, as a practical matter, most forfeitures are disposed of through the administrative remission procedures,[8] but that is constitutionally

[7] In *$8,850* the claimant conceded that no preseizure hearing is required when Customs makes a seizure at the border. Respondent does not dispute that here, and we doubt that he could. In *$8,850* we noted that while the general rule is that "absent an 'extraordinary situation' a party cannot invoke the power of the state to seize a person's property without a *prior* judicial determination that the seizure is justified. . . . [D]ue process does not require federal customs officials to conduct a hearing before seizing items subject to forfeiture." 461 U. S., at 562, n. 12. We reasoned that such a requirement would make customs processing entirely unworkable and also found that because "the seizure serves important governmental purposes[,] a preseizure notice might frustrate the statutory purpose . . . ." *Ibid.*

[8] We noted in *$8,850* that Customs processes over 50,000 noncontraband forfeitures per year, and that in 90% of all seizures, the claimant files a petition for remission or mitigation. We further noted that the Secretary

irrelevant. We noted in *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 234 (1972), that in the event an item is not declared at the border under § 1497 "[t]he Government need only prove that the property was brought into the United States without the required declaration; the Government bears no burden with respect to intent." The remission statute simply grants the Secretary the discretion not to pursue a complete forfeiture despite the Government's entitlement to one. Remission proceedings supply both the Government and the claimant a way to resolve a dispute informally rather than in judicial forfeiture proceedings. But remission proceedings are not *necessary* to a forfeiture determination, and therefore are not constitutionally required. Thus there is no constitutional basis for a claim that respondent's interest in the car, or in the money put up to secure the bond, entitles him to a speedy answer to his remission petition.

III

While his interest in the car is the only basis on which respondent relies in his support of the Court of Appeals' decision, the Government asks that the Court adjudge the case of a claimant who relies on the argument that § 1618 itself creates a property right which cannot be taken away without due process that includes a speedy answer to a remission petition. The Government argues that the statute creates no such right. We need not address the hypothetical, however. It is abundantly clear on the record in this case that, even if respondent had such a property right, any due process requirement of timely disposition was more than adequately provided here. It is difficult, indeed impossible, to see what prejudice respondent suffered from the 36-day delay in the response. True, he was without his car for 14 days, and then, for another 22 days, without the money he

in turn grants at least partial relief for an estimated 75% of the petitions. Typically, this mitigation process terminates the dispute without the necessity of filing a forfeiture action.

had to put up to secure a bond, and Von Neumann urges the importance of automobiles to citizens in this society. But we have already noted that his right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to the car and the money. In fact, it is not altogether certain that the delay dated from the filing on January 20 of the original remission petition. Respondent supplemented his remission petition and was given a final decision just 13 days later. Moreover, respondent gives no hint as to how or why even a 36-day delay in the disposition of his remission petition deprived him of the process he claims was his due in connection with that petition. He does not argue that the delay prejudiced his defense against the forfeiture, see *$8,850*, 461 U. S., at 569, and with respect to preparing his "case" for remission, that case was made at the time of filing and could not have been affected by the subsequent delay. On the record before us, the 36-day delay cannot be said to deprive respondent of due process of law.

Reversed.

CHIEF JUSTICE BURGER, concurring in part.

I join Parts I and II of the majority opinion, but do not agree with the Court's failure, in Part III of the opinion, to resolve an important question that is properly before the Court.

Part III declines to address the question whether a claimant may assert a due process "property" interest in the result of a discretionary petition for reduction of a statutory penalty. This question was expressly presented by our grant of the Government's petition for certiorari. The two opinions of the Court of Appeals are sufficiently ambiguous as to leave unclear whether or not that court was relying on Von Neumann's interest in the car itself, or on some interest in having his penalty reduced. In its initial opinion the Court of Appeals held that "[t]he delay in processing [respondent's] petition for remission or mitigation . . . violated his *due proc-*

ess right to prompt consideration of his claim." 660 F. 2d 1319, 1327 (CA9 1981) (emphasis added).

Whether respondent has any due process right in his claim for mitigation of the statutory penalty is a question properly before the Court, and we have an obligation to address it. Resolution of this issue is not difficult. We held in *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458 (1981), that a prisoner has no liberty interest cognizable under due process in a claim for a discretionary grant of parole, even though under the state parole procedure inmates were regularly and routinely granted release. It follows directly that there can be no possible due process property interest in a discretionary grant of a reduction in a statutory penalty unless we are prepared to modify *Dumschat*.

I would confront and resolve this issue rather than relying on the Court's alternative holding that the 36-day period satisfies due process regardless of what due process "interests" were actually involved.

JUSTICE STEVENS, concurring in the judgment.

The fact that remission procedures are not constitutionally required, *ante*, at 249–250, does not shed any light on the question whether the Government has an obligation to process remission petitions with reasonable diligence. For even though it was not obligated to do so, Congress has enacted legislation authorizing the Secretary of the Treasury to create such a procedure. The importance of this statutory procedure is underlined by the fact that it is used to resolve almost 50,000 claims every year. Its practical significance is also suggested by the fact that the number of at least partially successful claimants in remission proceedings is triple the number that come away emptyhanded. This record indicates that the remission petition is a principal mechanism for resolving the dispute between the Government and the individual that frequently results from the seizure of property at our borders.

When Congress authorizes a member of the Cabinet to establish a procedure of this importance to thousands of individuals, it surely intends that the procedure will be administered in a regular and fundamentally fair way. One element of fair procedure is a requirement of reasonable diligence in processing claims. Absent clear evidence to the contrary, I would therefore construe the statute as implicitly commanding the Secretary to act diligently, and would not speculate about the possibility that a wholly arbitrary remission procedure would comply with the Due Process Clause of the Fifth Amendment.*

Nevertheless, I agree with the Court's ultimate conclusion that on this record respondent has not demonstrated that the 36-day delay in responding to his petition was unlawful. I therefore concur in the judgment.

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*The Government concedes that, at least before the Customs Service acts on a remission petition, Congress has intended that the timeliness of the Government's response be fully reviewable. See Brief for United States 25, n. 20 ("A claimant is not powerless . . . to obtain a speedy resolution of the question of his interest in the property. If delay in processing the administrative petition for remission or mitigation is unreasonable under the Administrative Procedure Act, the claimant may file suit to attempt to compel the agency to act. 5 U. S. C. 706(1)").

VASQUEZ, WARDEN *v.* HILLERY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–836. Argued October 15, 1985—Decided January 14, 1986

In 1962, a California grand jury indicted respondent for murder. Before trial in California Superior Court, the judge refused to quash the indictment on the alleged ground that it had been issued by a grand jury from which blacks had been systematically excluded. Respondent was subsequently convicted of first-degree murder. After unsuccessfully pursuing appeals and collateral relief in the state courts for the next 16 years, respondent filed a habeas corpus petition in Federal District Court, again raising his equal protection challenge to the grand jury that indicted him. The District Court upheld the challenge, and the Court of Appeals affirmed.

Held:

1. Respondent's obligation to exhaust state remedies before seeking collateral relief in federal court was not circumvented by the fact that the District Court, pursuant to a valid exercise of its power to expand the record, directed the parties to present supplemental evidence (consisting of affidavits and a computer analysis assessing the mathematical possibility that chance or accident could have accounted for the exclusion of blacks from the grand jury), where such evidence did not fundamentally alter the claim already considered by the state courts. Pp. 257–260.

2. The longstanding rule requiring reversal of the conviction of a defendant indicted by a grand jury from which members of his own race were systematically excluded will not be abandoned in this case on the theory that discrimination in the grand jury amounted to harmless error and that respondent's conviction after a fair trial purged any taint attributable to the grand jury process. Intentional discrimination in the selection of grand jurors is a grave constitutional trespass, possible only under color of state authority, and wholly within the State's power to prevent. Even if the grand jury's determination of probable cause to believe that a defendant has committed a crime is confirmed in hindsight by a conviction on the indicted offense, that confirmation does not suggest that discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or existence of the proceedings to come. And just as a conviction is void under the Equal Protection Clause if the prosecutor deliberately charged the defendant on account of

his race, a conviction cannot be understood to cure the taint attributable to a grand jury selected on the basis of race. Pp. 260–264.

3. Sound jurisprudence counsels against adoption of a rule whereby the grant of federal habeas corpus relief to a state prisoner would be conditioned upon the passage of time between his conviction and the filing of the federal habeas corpus petition, depending upon the State's ability to obtain a second conviction. Pp. 264–265.

4. The decision in this case is supported, but not compelled, by the *stare decisis* doctrine, the means by which this Court ensures that the law will not merely change erratically but will develop in a principled and intelligible fashion. Pp. 265–266.

733 F. 2d 644, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, and in all but the sixth paragraph of Part III of which WHITE, J., joined. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 266. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 267.

William George Prahl, Supervising Deputy Attorney General of California, argued the cause for petitioner. With him on the brief was *John K. Van de Kamp*, Attorney General.

Clifford Earl Tedmon, by appointment of the Court, 471 U. S. 1002, argued the cause and filed a brief for respondent.*

JUSTICE MARSHALL delivered the opinion of the Court.

The Warden of San Quentin State Prison asks this Court to retire a doctrine of equal protection jurisprudence first announced in 1880. The time has come, he urges, for us to abandon the rule requiring reversal of the conviction of any defendant indicted by a grand jury from which members of his own race were systematically excluded.

I

In 1962, the grand jury of Kings County, California, indicted respondent, Booker T. Hillery, for a brutal murder.

**Julius LeVonne Chambers, Steven L. Winter,* and *Anthony G. Amsterdam* filed a brief for the NAACP Legal Defense & Educational Fund, Inc., as *amicus curiae* urging affirmance.

Before trial in Superior Court, respondent moved to quash the indictment on the ground that it had been issued by a grand jury from which blacks had been systematically excluded. A hearing on respondent's motion was held by Judge Meredith Wingrove, who was the sole Superior Court Judge in the county and had personally selected all grand juries, including the one that indicted respondent, for the previous seven years. Absolving himself of any discriminatory intent, Judge Wingrove refused to quash the indictment.[1] Respondent was subsequently convicted of first-degree murder.

For the next 16 years, respondent pursued appeals and collateral relief in the state courts, raising at every opportunity his equal protection challenge to the grand jury that indicted him.[2] Less than one month after the California Supreme Court foreclosed his final avenue of state relief in 1978, respondent filed a petition for a writ of habeas corpus in federal court, raising that same challenge. The District Court concluded that respondent had established discrimination in the grand jury, and granted the writ. See *Hillery* v. *Pulley*, 563 F. Supp. 1228 (ED Cal. 1983). The Court of Appeals

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[1] Three thorough and well-reasoned opinions of the District Court discuss in detail the evidence adduced at the hearing, as well as other aspects of the case. See *Hillery* v. *Pulley*, 563 F. Supp. 1228 (ED Cal. 1983); *Hillery* v. *Pulley*, 533 F. Supp. 1189 (ED Cal. 1982); *Hillery* v. *Sumner*, 496 F. Supp. 632 (ED Cal. 1980). We repeat here only those portions relevant to the issues before the Court.

[2] See *People* v. *Hillery*, 34 Cal. Rptr. 853, 386 P. 2d 477 (1963) (affirming conviction; rejecting discrimination claim); *People* v. *Hillery*, 62 Cal. 2d 692, 401 P. 2d 382 (1965) (on rehearing, rejecting discrimination claim; reversing sentence), cert. denied, 386 U. S. 938 (1967); *People* v. *Hillery*, 65 Cal. 2d 795, 423 P. 2d 208 (1967) (after remand, affirming sentence), cert. denied, 389 U. S. 986 (1968); *In re Hillery*, 71 Cal. 2d 857, 457 P. 2d 565 (1969) (on original petition for habeas corpus, reversing sentence); *People* v. *Hillery*, 10 Cal. 3d 897, 519 P. 2d 572 (1974) (after remand, reducing sentence); *In re Hillery*, Crim. No. 20424 (Cal. 1978) (affirming denial of state habeas corpus).

affirmed, 733 F. 2d 644 (CA9 1984), and we granted certiorari, 470 U. S. 1026 (1985).

II

As a threshold matter, we turn to petitioner's contention that respondent has circumvented his obligation to exhaust state remedies before seeking collateral relief in federal court. 28 U. S. C. § 2254(b). The exhaustion issue had its genesis in this case when the Federal District Judge saw a need to "supplement and clarify" the state-court record presented for review. Record, Doc. No. 8, p. 2. Upon authority of 28 U. S. C. § 2254 Rule 7, the judge directed the State to provide more figures "demonstrating what portion of the Black population in Kings County was eligible for grand jury service." Record, Doc. No. 8, p. 3. He also directed the parties to present their views regarding the application of statistical probability analysis to the facts of this case, to assist him in "focus[ing] on the likelihood that chance or accident alone could account for the exclusion of a group from grand jury service." *Ibid.* Petitioner objects that the submissions made in response to the judge's order "drastically" altered respondent's claim and rendered it unsuitable for federal habeas review without prior consideration by the state courts. Brief for Petitioner 81.

The exhaustion doctrine seeks to afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary. *Rose* v. *Lundy*, 455 U. S. 509, 515 (1982). Under standards established by this Court, a state prisoner may initiate a federal habeas petition "[o]nly if the state courts have had the first opportunity to hear the claim sought to be vindicated . . . ." *Picard* v. *Connor*, 404 U. S. 270, 276 (1971). "It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied." *Id.*, at 275; see also *Humphrey* v. *Cady*, 405 U. S. 504, 516–517, n. 18 (1972). We have never held that presentation

of additional facts to the district court, pursuant to that court's directions, evades the exhaustion requirement when the prisoner has presented the substance of his claim to the state courts. See *Picard*, *supra*, at 278.

Rule 7(b) permits a federal district court in a habeas proceeding to expand the existing record to "include, without limitation, . . . documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record." In this case, the District Court sought to clarify the relevant facts, an endeavor wholly consistent with Rule 7 and the purpose of the writ. See *Townsend* v. *Sain*, 372 U. S. 293, 313 (1963). The sole question here is whether this valid exercise of the court's power to expand the record had the effect of undermining the policies of the exhaustion requirement.

Several affidavits challenged here as "new" evidence supported respondent's allegations that no black had ever served on the grand jury in Kings County and that qualified blacks in the county were available to serve, which he had pressed in his pretrial motion to quash in Superior Court, App. 28–30, and throughout the state proceedings. The California Supreme Court found that the total absence of blacks from the grand jury in the history of Kings County was an undisputed fact. *People* v. *Hillery*, 62 Cal. 2d 692, 709, 401 P. 2d 382, 392 (1965), cert. denied, 386 U. S. 938 (1967). That fact was entitled, therefore, to a presumption of correctness on federal review. *Sumner* v. *Mata*, 449 U. S. 539, 545–546 (1981); see *Hillery* v. *Pulley*, 533 F. Supp. 1189, 1201, n. 25 (ED Cal. 1982). The California Supreme Court also discussed Judge Wingrove's consideration of blacks' qualifications, and found that blacks had served as petit jurors, 62 Cal. 2d, at 710, 401 P. 2d, at 392–393, minimum eligibility requirements for which were substantially the same as for grand jurors, see 563 F. Supp., at 1245; Mar, The California Grand Jury: Vestige of Aristocracy, 1 Pac. L. J. 36, 40

(1970). Consequently, the additional affidavits introduced no claim upon which the state courts had not passed.

The remaining "new" evidence under attack, a computer analysis submitted in response to the District Court's request, assessed the mathematical probability that chance or accident could have accounted for the exclusion of blacks from the Kings County grand jury over the years at issue.[3] Petitioner would have us conclude that the "sophisticated computer techniques" rendered respondent's claim a "wholly different animal." Brief for Petitioner 80–81. These statistical estimates, however, added nothing to the case that this Court has not considered intrinsic to the consideration of any grand jury discrimination claim. As early as 1942, this Court rejected a contention that absence of blacks on the grand jury was insufficient to support an inference of discrimination, summarily asserting that "chance or accident could hardly have accounted for the continuous omission of negroes from the grand jury lists for so long a period as sixteen years or more." *Hill* v. *Texas*, 316 U. S. 400, 404 (1942). This proposition, which the Court derived solely on the basis of judicial intuition, is precisely what respondent sought to establish by methods now considered somewhat more reliable.

More recently, in reviewing a habeas corpus proceeding, this Court independently applied general statistical principles to the evidence on the record in order to assess the role of chance in the exclusion of Mexican-Americans from a grand jury in Texas. *Castaneda* v. *Partida*, 430 U. S. 482,

[3] The statistical expert concluded that if the grand juries selected in Kings County between 1900 and 1962 had been chosen by chance, the probability that no black would have been selected was 57 in 100,000 million. Although the State made no attempt to rebut this testimony, the District Court questioned the reliability of the expert's analysis, performed its own analysis of the data, and ultimately accepted the expert's conclusions only for the 7-year period of Judge Wingrove's tenure, which yielded a probability of 2 in 1,000 that the phenomenon was attributable to chance. 563 F. Supp., at 1241–1244.

496–497, n. 17 (1977). Form would indeed triumph over substance were we to allow the question of exhaustion to turn on whether a federal judge has relied on educated conjecture or has sought out a more sophisticated interpretative aid to accomplish the same objective.

We emphasize that the District Court's request for further information was evidently motivated by a responsible concern that it provide the meaningful federal review of constitutional claims that the writ of habeas corpus has contemplated throughout its history. 533 F. Supp., at 1202–1203; see *Townsend* v. *Sain*, *supra*, at 311–312. Respondent had initially submitted only the evidence that had been considered in state court, and subsequently complied with the court's request by furnishing materials no broader than necessary to meet the needs of the court. Accordingly, the circumstances present no occasion for the Court to consider a case in which the prisoner has attempted to expedite federal review by deliberately withholding essential facts from the state courts. We hold merely that the supplemental evidence presented by respondent did not fundamentally alter the legal claim already considered by the state courts, and, therefore, did not require that respondent be remitted to state court for consideration of that evidence.

III

On the merits, petitioner urges this Court to find that discrimination in the grand jury amounted to harmless error in this case, claiming that the evidence against respondent was overwhelming and that discrimination no longer infects the selection of grand juries in Kings County. Respondent's conviction after a fair trial, we are told, purged any taint attributable to the indictment process. Our acceptance of this theory would require abandonment of more than a century of consistent precedent.

In 1880, this Court reversed a state conviction on the ground that the indictment charging the offense had been

issued by a grand jury from which blacks had been excluded. We reasoned that deliberate exclusion of blacks "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Strauder* v. *West Virginia*, 100 U. S. 303, 308 (1880).

Thereafter, the Court has repeatedly rejected all arguments that a conviction may stand despite racial discrimination in the selection of the grand jury. See, *e. g.*, *Neal* v. *Delaware*, 103 U. S. 370, 396 (1881); *Bush* v. *Kentucky*, 107 U. S. 110 (1883); *Gibson* v. *Mississippi*, 162 U. S. 565 (1896); *Carter* v. *Texas*, 177 U. S. 442 (1900); *Rogers* v. *Alabama*, 192 U. S. 226 (1904); *Pierre* v. *Louisiana*, 306 U. S. 354 (1939); *Smith* v. *Texas*, 311 U. S. 128 (1940); *Hill* v. *Texas*, *supra*; *Cassell* v. *Texas*, 339 U. S. 282 (1950); *Reece* v. *Georgia*, 350 U. S. 85 (1955); *Eubanks* v. *Louisiana*, 356 U. S. 584 (1958); *Arnold* v. *North Carolina*, 376 U. S. 773 (1964); *Alexander* v. *Louisiana*, 405 U. S. 625 (1972). Only six years ago, the Court explicitly addressed the question whether this unbroken line of case law should be reconsidered in favor of a harmless-error standard, and determined that it should not. *Rose* v. *Mitchell*, 443 U. S. 545 (1979).[4]

[4]The dissent attempts to lessen the precedential weight of *Mitchell* by characterizing it as an advisory opinion. *Post*, at 270, n. 4. In Part II of *Mitchell*, three Justices reaffirmed the principle that grand jury discrimination requires reversal of the conviction in all cases; in Parts III and IV, they concluded that the prisoner had failed to make out a prima facie case of discrimination. 443 U. S., at 574. Two additional Justices explicitly joined Part II, but dissented from the judgment because they believed that discrimination had been established, and that the conviction must, therefore, be reversed. *Id.*, at 588 (WHITE, J., joined by STEVENS, J., dissenting). The dissent here offers a citation to *Gregg* v. *Georgia*, 428 U. S. 153, 169, n. 15 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.), in support of its unprecedented argument that a statement of legal opinion joined by five Justices of this Court does not carry the force of law. The cited passage, however, refers only to the manner in which one may discern a single holding of the Court in cases in which no opinion on the

We reaffirmed our conviction that discrimination on the basis of race in the selection of grand jurors "strikes at the fundamental values of our judicial system and our society as a whole," and that the criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded. *Id.*, at 556.

Petitioner argues here that requiring a State to retry a defendant, sometimes years later, imposes on it an unduly harsh penalty for a constitutional defect bearing no relation to the fundamental fairness of the trial. Yet intentional discrimination in the selection of grand jurors is a grave constitutional trespass, possible only under color of state authority, and wholly within the power of the State to prevent. Thus, the remedy we have embraced for over a century—the only effective remedy for this violation[5]—is not disproportionate to the evil that it seeks to deter. If grand jury discrimination becomes a thing of the past, no conviction will ever again be lost on account of it.

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issue in question has garnered the support of a majority. That discussion is inapplicable to Part II of *Mitchell*, to which five Justices expressly subscribed.

[5] As we pointed out in *Rose* v. *Mitchell*, alternative remedies are ineffectual. Federal law provides a criminal prohibition against discrimination in the selection of grand jurors, 18 U. S. C. § 243, but according to statistics compiled by the Administrative Office of the United States Courts, that section has not been the basis for a single prosecution in the past nine years. With respect to prior years, for which precise information is not available, we have been unable to find evidence of any prosecution or conviction under the statute in the last century. The other putative remedy for grand jury discrimination is 42 U. S. C. § 1983, which, in theory, allows redress for blacks who have been excluded from grand jury service. See *Carter* v. *Jury Comm'n of Greene County*, 396 U. S. 320 (1970). These suits are also extremely rare, undoubtedly because the potential plaintiffs, eligible blacks not called for grand jury service, are often without knowledge of the discriminatory practices and without incentive to launch costly legal battles to stop them.

Nor are we persuaded that discrimination in the grand jury has no effect on the fairness of the criminal trials that result from that grand jury's actions. The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense—all on the basis of the same facts. Moreover, "[t]he grand jury is not bound to indict in every case where a conviction can be obtained." *United States* v. *Ciambrone*, 601 F. 2d 616, 629 (CA2 1979) (Friendly, J., dissenting). Thus, even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come.

When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired. See *Tumey* v. *Ohio*, 273 U. S. 510, 535 (1927) (reversal required when judge has financial interest in conviction, despite lack of indication that bias influenced decisions). Similarly, when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained. See *Davis* v. *Georgia*, 429 U. S. 122 (1976) *(per curiam); Sheppard* v. *Maxwell*, 384 U. S. 333, 351–352 (1966). Like these fundamental flaws, which never have been thought harmless, discrimination in the grand jury undermines the structural integrity of the

criminal tribunal itself, and is not amenable to harmless-error review.[6]

Just as a conviction is void under the Equal Protection Clause if the prosecutor deliberately charged the defendant on account of his race, see *United States* v. *Batchelder*, 442 U. S. 114, 125, n. 9 (1979), a conviction cannot be understood to cure the taint attributable to a charging body selected on the basis of race. Once having found discrimination in the selection of a grand jury, we simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted. The overriding imperative to eliminate this systemic flaw in the charging process, as well as the difficulty of assessing its effect on any given defendant, requires our continued adherence to a rule of mandatory reversal.

The opinion of the Court in *Mitchell* ably presented other justifications, based on the necessity for vindicating Fourteenth Amendment rights, supporting a policy of automatic reversal in cases of grand jury discrimination. That analysis persuasively demonstrated that the justifications retain their validity in modern times, for "114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole." 443 U. S., at 558–559. The six years since *Mitchell* have given us no reason to doubt the continuing truth of that observation.

IV

The dissent propounds a theory, not advanced by any party, which would condition the grant of relief upon the passage of time between a conviction and the filing of a petition for federal habeas corpus, depending upon the ability of a State to obtain a second conviction. Sound jurisprudence

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[6] JUSTICE WHITE does not join in the foregoing paragraph.

counsels against our adoption of that approach to habeas corpus claims.

The Habeas Corpus Rules permit a State to move for dismissal of a habeas petition when it "has been prejudiced in its ability to respond to the petition by delay in its filing." 28 U. S. C. §2254 Rule 9(a). Indeed, petitioner filed such a motion in this case, and it was denied because the District Court found that no prejudicial delay had been caused by respondent. *Hillery* v. *Sumner*, 496 F. Supp. 632, 637 (ED Cal. 1980). Congress has not seen fit, however, to provide the State with an additional defense to habeas corpus petitions based on the difficulties that it will face if forced to retry the defendant. The Judicial Conference Advisory Committee on Criminal Rules has drafted a proposed amendment to Rule 9(a), which would permit dismissal of a habeas corpus petition upon a demonstration that the State has been prejudiced, either in defending against the prisoner's federal claim or in bringing the prisoner to trial again should the federal claim prove meritorious. 52 U. S. L. W. 2145 (1983). That proposal has not been adopted. And, despite many attempts in recent years, Congress has yet to create a statute of limitations for federal habeas corpus actions. See L. Yackle, Postconviction Remedies § 19 (Supp. 1985) (describing relevant bills introduced in past several Congresses). We should not lightly create a new judicial rule, in the guise of constitutional interpretation, to achieve the same end.

V

Today's decision is supported, though not compelled, by the important doctrine of *stare decisis*, the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in

fact. While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged "to bring its opinions into agreement with experience and with facts newly ascertained." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 412 (1932) (Brandeis, J., dissenting).

Our history does not impose any rigid formula to constrain the Court in the disposition of cases. Rather, its lesson is that every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective. In the case of grand jury discrimination, we have been offered no reason to believe that any such metamorphosis has rendered the Court's long commitment to a rule of reversal outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration. On the contrary, the need for such a rule is as compelling today as it was at its inception.

The judgment of the Court of Appeals, accordingly, is affirmed.

It is so ordered.

JUSTICE O'CONNOR, concurring in the judgment.

This Court has long held that upon proof of systematic exclusion of blacks from a grand jury issuing an indictment, the admittedly costly remedy of reversal of a conviction thereafter obtained through a fair trial is necessary in order to eradicate and deter such discrimination. Not until *Rose* v. *Mitchell*, 443 U. S. 545 (1979), however, did the Court squarely address the question whether, given the availability of this remedy on direct review, it is also necessary to make the same remedy available when the petitioner secks to renew his claim of discriminatory exclusion on federal habeas corpus review. See *id.*, at 582 (POWELL, J., concurring in judgment).

I share the view expressed by JUSTICE POWELL in *Rose:* a petitioner who has been afforded by the state courts a full

and fair opportunity to litigate the claim that blacks were discriminatorily excluded from the grand jury which issued the indictment should be foreclosed from relitigating that claim on federal habeas. The incremental value that continued challenges may have in rooting out and deterring such discrimination is outweighed by the unique considerations that apply when the habeas writ is invoked. The history and purposes of the writ, as well as weighty finality interests and considerations of federalism, counsel against permitting a petitioner to renew on habeas a challenge which does not undermine the justness of his trial, conviction, or incarceration. See *id.*, at 579–588.

In this case, the District Court held that respondent was not given a full and fair hearing on his discriminatory exclusion claim in state court. See *Hillery* v. *Pulley*, 563 F. Supp. 1228 (ED Cal. 1983). That holding was not altered on appeal, 733 F. 2d 644 (CA9 1984), nor is it challenged by the petitioner in this Court. Respondent's claim was therefore cognizable in federal habeas proceedings. Because I am not convinced that a sufficiently compelling case has been made for reversing this Court's precedents with respect to the remedy applicable to properly cognizable claims of discriminatory exclusion of grand jurors, I concur in the judgment of the Court.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

Respondent, a black man, was indicted by a grand jury having no black members for the stabbing murder of a 15-year-old girl. A petit jury found respondent guilty of that charge beyond a reasonable doubt, in a trial the fairness of which is unchallenged here.[1] Twenty-three years later, we are asked to grant respondent's petition for a writ of habeas

[1] Respondent was thrice sentenced to death for this murder. See *People* v. *Hillery*, 10 Cal. 3d 897, 519 P. 2d 572 (1974); *ante*, at 256, n. 2. That sentence was ultimately reduced to life imprisonment because the California Supreme Court found that imposition of the death penalty was in all cases inconsistent with the California Constitution. *Ibid.*

corpus—and thereby require a new trial if that is still feasible—on the ground that blacks were purposefully excluded from the grand jury that indicted him. It is undisputed that race discrimination has long since disappeared from the grand jury selection process in Kings County, California. It is undisputed that a grand jury that perfectly represented Kings County's population at the time of respondent's indictment would have contained only one black member.[2] Yet the Court holds that respondent's petition must be granted, and that respondent must be freed unless the State is able to reconvict, more than two decades after the murder that led to his incarceration.

It is difficult to reconcile this result with a rational system of justice. The Court nevertheless finds its decision compelled by a century of precedent and by the interests of respondent and of society in ending race discrimination in the selection of grand juries. I dissent for two reasons. First, in my view, any error in the selection of the grand jury that indicted respondent is constitutionally harmless. Second, even assuming that the harmless-error rule does not apply, reversal of respondent's conviction is an inappropriate remedy for the wrong that prompts this case.

I

The Court concludes that the harmless-error rule does not apply to claims of grand jury discrimination. *Ante*, at 261. This conclusion is said to follow from a line of cases going back over 100 years. *Ante*, at 260–261. In my view, it follows from a misapplication of the doctrine of *stare decisis*.

Adhering to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet* v.

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[2] According to 1960 census figures, 4.7% of Kings County's population over age 21 was black. *Hillery* v. *Pulley*, 563 F. Supp. 1228, 1232 (ED Cal. 1983). Respondent's grand jury consisted of 19 individuals, all of whom were white. *Id.*, at 1231.

Coronado Oil & Gas Co., 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting). Accordingly, "any departure from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984); *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 559 (1985) (POWELL, J., dissenting). Nevertheless, when governing decisions are badly reasoned, or conflict with other, more recent authority, the Court "has never felt constrained to follow precedent." *Smith* v. *Allwright*, 321 U. S. 649, 665 (1944). Instead, particularly where constitutional issues are involved, "[t]his Court has shown a readiness to correct its errors even though of long standing." *United States* v. *Barnett*, 376 U. S. 681, 699 (1964). In this case, the Court misapplies *stare decisis* because it relies only on decisions concerning grand jury discrimination. There is other precedent, including important cases of more recent vintage than those cited by the Court, that should control this case. Those cases hold, or clearly imply, that a conviction should not be reversed for constitutional error where the error did not affect the outcome of the prosecution.

In *Chapman* v. *California*, 386 U. S. 18 (1967), the Court held that a trial judge's improper comment on the defendant's failure to testify—a clear violation of the Fifth and Fourteenth Amendments—was not a proper basis for reversal if harmless. *Id.*, at 21–24. Since *Chapman*, "the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." *United States* v. *Hasting*, 461 U. S. 499, 509 (1983). This rule has been applied to a variety of constitutional violations. See *Harrington* v. *California*, 395 U. S. 250 (1969) (use of co-conspirator confession in violation of Confrontation Clause); *Coleman* v. *Alabama*, 399 U. S. 1 (1970) (denial of counsel at preliminary hearing); *Milton* v. *Wainwright*, 407 U. S. 371 (1972) (use of confession obtained in violation of

right to counsel); *Gerstein* v. *Pugh*, 420 U. S. 103 (1975) (illegal arrest).

Other doctrines reflect the same principle. A defendant claiming ineffective assistance of counsel must show that counsel's incompetence caused him actual prejudice. *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984). This is so even though counsel "made errors so serious that [he] was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Ibid.*[3] Similarly, a defendant who is barred by a procedural default from asserting a constitutional claim on direct appeal cannot raise the claim on habeas corpus without showing that the error actually prejudiced him. *United States* v. *Frady*, 456 U. S. 152, 170 (1982); see also *Wainwright* v. *Sykes*, 433 U. S. 72 (1977).

In *Rose* v. *Mitchell*, 443 U. S. 545 (1979), the Court contended that the principle of these cases is inapplicable to grand jury discrimination claims, because grand jury discrimination "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process."[4] *Id.*, at 555–556. But *every* constitutional error may be said to raise questions as to the "appearance of justice" and the "integrity

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[3] As the Court stated in *Strickland*, "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." 466 U. S., at 695.

[4] Although all parts of JUSTICE BLACKMUN's opinion in *Rose* v. *Mitchell* were joined by four other Justices, its precedential weight is subject to some question. In particular, Part II of the opinion—the part that discusses the legal principles applicable to grand jury discrimination claims generally—was not joined by five Justices who also joined in the judgment. Cf. *Gregg* v. *Georgia*, 428 U. S. 153, 169, n. 15 (1976) (Court's holding is "that position taken by those Members who concurred in the judgments on the narrowest grounds"). Moreover, the opinion's discussion of general principles was irrelevant to the result, which turned on the insufficiency of the evidence of discrimination. In my view, therefore, *Rose* is little more than an advisory opinion. See *Flast* v. *Cohen*, 392 U. S. 83, 94–95 (1968); Frankfurter, Note on Advisory Opinions, 37 Harv. L. Rev. 1002, 1005–1007 (1924).

of the judicial process." Nevertheless, as the cases cited above show, the Court has required some showing of actual prejudice to the defendant as a prerequisite to reversal, even when the constitutional error directly affects the fairness of the defendant's trial. Compare *Strickland* v. *Washington*, *supra*, at 687 (requiring prejudice in ineffective assistance of counsel claims), with *Gideon* v. *Wainwright*, 372 U. S. 335, 344–345 (1963) (emphasizing importance of right to counsel to ensure fair trial). Grand jury discrimination is a serious violation of our constitutional order, but so also are the deprivations of rights guaranteed by the Fourth, Fifth, Sixth, and Fourteenth Amendments to which we have applied harmless-error analysis or an analogous prejudice requirement. Moreover, grand jury discrimination occurs *prior* to trial, while the asserted constitutional violations in most of the above-cited cases occurred *during* trial. The Court does not adequately explain why grand jury discrimination affects the "integrity of the judicial process" to a greater extent than the deprivation of equally vital constitutional rights, nor why it is exempt from a prejudice requirement while other constitutional errors are not.

Thirty-one years ago, in a typically prescient opinion, Justice Jackson called for such an explanation. *Cassell* v. *Texas*, 339 U. S. 282, 299 (1950) (Jackson, J., dissenting). None has been forthcoming. *Rose* v. *Mitchell*, *supra*, at 575 (Stewart, J., concurring in judgment). Since then, as the cases cited above show, the Court has firmly established the principle that error that does not affect the outcome of a prosecution cannot justify reversing an otherwise valid conviction. That proposition—and the decisions of the last two decades that have reinforced it—is flatly inconsistent with the result reached today. The Court's failure to reconcile this conflict itself violates the doctrine of *stare decisis*.

I would dissent from the Court's decision for this reason alone. The reasoning of *Chapman* and its progeny accords with a rational system of justice—one that fully preserves

constitutional rights but recognizes that not every violation undermines the fairness of a given conviction. In this case, the grand jury error did not affect the fairness of respondent's trial or otherwise injure respondent in any cognizable way. *Infra*, at 274–277. I therefore would reverse the Court of Appeals.

II

Even assuming that now-established harmless-error principles are inapplicable, this case unjustifiably extends the "century of precedent" on which the Court relies. Those decisions do not require reversal of a decades-old conviction on the ground that it was preceded by an indictment issued by a discriminatorily selected grand jury. The purposes of the "automatic reversal" rule require otherwise.

A

No one questions that race discrimination in grand jury selection violates the Equal Protection Clause of the Fourteenth Amendment. *E. g.*, *Rose* v. *Mitchell*, 443 U. S., at 551; *id.*, at 577–578 (Stewart, J., concurring in judgment); *id.*, at 590–591 (WHITE, J., dissenting). The issue in this case is not whether the State erred, but what should be done about it. The question is whether reversal of respondent's conviction either is compelled by the Constitution or is an appropriate, but not constitutionally required, remedy for racial discrimination in the selection of grand jurors. See *Bush* v. *Lucas*, 462 U. S. 367, 378 (1983); *Davis* v. *Passman*, 442 U. S. 228, 245 (1979); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 403, 407 (1971) (Harlan, J., concurring in judgment).

The Constitution does not compel the rule of automatic reversal that the Court applies today. In *Hobby* v. *United States*, 468 U. S. 339 (1984), we acknowledged that discriminatory selection of grand jury foremen violated the Constitution, but we concluded that reversing the petitioner's conviction was an inappropriate remedy for the violation since

grand jury foremen play a minor part in federal prosecutions. *Id.*, at 345–346; see also *Oregon* v. *Elstad*, 470 U. S. 298, 305–307 (1985) (suppression of evidence obtained in violation of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), is not constitutionally compelled); *United States* v. *Leon*, 468 U. S. 897, 905–906 (1984) (suppression of evidence obtained in violation of the Fourth Amendment is not constitutionally compelled); *Stone* v. *Powell*, 428 U. S. 465, 489 (1976); see generally Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975). The rationale of *Hobby* cannot be squared with the claim that discriminatory selection of the body that charged the defendant *compels* reversal of the defendant's conviction. Rather, it is necessary to determine whether reversal of respondent's conviction is an "appropriate remedy" for the exclusion of blacks from grand juries in Kings County, California, in 1962.[5] *Hobby*, *supra*, at 342; see *Rose* v. *Mitchell*, *supra*, at 558–559 (weighing costs and benefits of awarding relief to petitioners claiming grand jury discrimination). Cf. Merrill, The Common Law Powers of Federal Courts, 52 U. Chi. L. Rev. 1, 53 (1985) (arguing that judicially created remedies are appropriate only when "necessary in order to preserve a specifically intended federal right"). That determination depends on (i) the utility of the remedy in either correcting any injustice to respondent or deterring unconstitutional conduct by state officials, and (ii) the remedy's costs to society. *United States* v. *Leon*, *supra*, at 906–907; *Stone* v. *Powell*, *supra*, at 489.

B

The scope of the remedy depends in part on the nature and degree of the harm caused by the wrong. The Court perceives two kinds of harm flowing from grand jury discrimination: harm to respondent's interest in not being charged

[5] Respondent does not allege that discriminatory selection of grand jurors continued after 1962. Nor is there anything in the record to support such an allegation.

and convicted because of his race, and harm to society's interest in deterring racial discrimination. I consider in turn these asserted interests and the degree to which they are served in this case by the Court's automatic reversal rule.

(1)

The Court does not contend that the discriminatory selection of the grand jury that indicted respondent calls into question the correctness of the decision to indict. Such a contention could not withstand analysis. Following his indictment for murder, respondent was convicted of that charge in a trial and by a jury whose fairness is not now challenged. The conviction, affirmed on direct appeal in 1965,[6] establishes that the grand jury's decision to indict was indisputably correct. *Rose* v. *Mitchell*, *supra*, at 575–576 (Stewart, J., concurring in judgment); *Cassell* v. *Texas*, 339 U. S., at 301–302 (Jackson, J., dissenting). Justice Jackson expressed the point best:

> "It hardly lies in the mouth of a defendant whom a fairly chosen trial jury has found guilty beyond reasonable doubt, to say that his indictment is attributable to prejudice. In this case a trial judge heard the prosecution's evidence, ruled it sufficient to warrant a conviction, appellate courts have held the same, and no further question about it is before us. Moreover, a jury admittedly chosen without racial discrimination has heard the prosecution's and defendant's evidence and has held that guilt beyond a reasonable doubt has been proved. That finding, too, has been affirmed on appeal and is not here. Under such circumstances, it is frivolous to contend that any grand jury, however constituted, could have done its

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[6]The California Supreme Court affirmed respondent's conviction in 1963; on rehearing in 1965, the court reversed respondent's death sentence but again affirmed his conviction. *Ante*, at 256, n. 2. Respondent is presently serving a sentence of life imprisonment.

duty in any way other than to indict." *Cassell* v. *Texas*, *supra*, at 302 (dissenting).

The Court nevertheless decides that discrimination in the selection of the grand jury potentially harmed respondent, because the grand jury is vested with broad discretion in deciding whether to indict and in framing the charges, and because it is impossible to know whether this discretion would have been exercised differently by a properly selected grand jury. *Ante*, at 263. The point appears to be that an all-white grand jury from which blacks are systematically excluded might be influenced by race in determining whether to indict and for what charge. Since the State may not imprison respondent for a crime if one of its elements is his race, the argument goes, his conviction must be set aside.

This reasoning ignores established principles of equal protection jurisprudence. We have consistently declined to find a violation of the Equal Protection Clause absent a finding of intentional discrimination. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 265 (1977); *Washington* v. *Davis*, 426 U. S. 229, 239 (1976). There has been no showing in this case—indeed, respondent does not even allege—that the Kings County grand jury indicted respondent because of his race, or that the grand jury declined to indict white suspects in the face of similarly strong evidence.[7] Nor is it sensible to assume that impermissible dis-

[7] Most criminal cases in Kings County were initiated by information rather than indictment. In the decade ending in 1962, Kings County grand juries indicted a total of only four persons, only one of whom was black. *People* v. *Hillery*, 62 Cal. 2d 692, 710, 401 P. 2d 382, 393 (1965), cert. denied, 386 U. S. 938 (1967). In light of these facts, any claim that discriminatory selection of grand jurors was a mechanism for applying different standards to black offenders than to their white counterparts seems altogether fanciful.

Nor is there any *direct* evidence that the grand jury discriminated against respondent because of his race. The only discrimination in this case was directed not at respondent but at the black residents of Kings County, who were barred from serving on grand juries because of their

crimination might have occurred simply because the grand jury had no black members. This Court has never suggested that the racial composition of a grand jury gives rise to the inference that indictments are racially motivated, any more than it has suggested that a suspect arrested by a policeman of a different race may challenge his subsequent conviction on that basis.[8] But the Court now holds that relief is justified in part because of the bare potential, unsupported by any evidence, that an all-white grand jury charged respondent because of his race.

This justification does not square with the Court's previous decisions in this area; at the same time, it fails to explain the outcome of this case. In *Castaneda* v. *Partida*, 430 U. S. 482 (1977), for example, the Court ordered a new trial for a Hispanic petitioner who was indicted by a grand jury half of whose members were Hispanic. Whatever value such a result might have, it cannot be justified on the ground that the grand jury indicted the petitioner because of his race. In this case, due to the small number of blacks in Kings County, a random selection system could well have resulted in a grand jury identical to the one that indicted respondent. A perfectly representative grand jury—one whose composition reflected the county's racial mix—would have contained only one black member. Neither outcome would have justified an inference that respondent had been charged because of his race. See *Akins* v. *Texas*, 325 U. S. 398, 403 (1945).

Once the inference of racial bias in the decision to indict is placed to one side, as it must be under our precedents, it is

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race. There is nothing in the record to support a finding that the grand jurors themselves discriminated against anyone on the basis of race, or that they otherwise failed to discharge their duties properly.

[8] Instead, as the Court apparently acknowledges, a validly convicted criminal defendant must show that he was "deliberately charged . . . on account of his race" in order to obtain reversal of the conviction. *Ante*, at 264 (citing *United States* v. *Batchelder*, 442 U. S. 114, 125, and n. 9 (1979)). Respondent has not even alleged, much less shown, any discrimination directed at him. See n. 7, *supra*.

impossible to conclude that the discriminatory selection of Kings County's grand jurors caused respondent to suffer any cognizable injury. There may be a theoretical possibility that a different grand jury might have decided not to indict or to indict for a less serious charge. The fact remains, however, that the grand jury's decision to indict was *correct as a matter of law*, given respondent's subsequent, unchallenged conviction. A defendant has no right to a grand jury that errs in his favor. At most, he has an interest in not being bound over for trial in the absence of any evidence of his guilt, see *Costello* v. *United States*, 350 U. S. 359, 364 (1956) (Burton, J., concurring),[9] or based on impermissible factors such as his race, see *Oyler* v. *Boles*, 368 U. S. 448, 456 (1962). There is no allegation that those rights were violated in this case. The Court's decision cannot, therefore, be justified as a means of redressing any wrong to respondent.

(2)

As respondent suffered no prejudice from the grand jury discrimination that prompted his claim, the Court's remedy must stand or fall on its utility as a deterrent to government officials who seek to exclude particular groups from grand juries, weighed against the cost that the remedy imposes on society. See *United States* v. *Leon*, 468 U. S., at 906–907. The Court properly emphasizes that grand jury discrimination is "a grave constitutional trespass," *ante*, at 262, but it leaps from that observation to the conclusion that *no matter when the claim is raised* the appropriate response is to reverse the conviction of one indicted by a discriminatorily se-

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[9] I do not intend to suggest that respondent could have obtained judicial review of the sufficiency of the evidence on which his indictment was based. See *United States* v. *Calandra*, 414 U. S. 338, 345 (1974) ("[A]n indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence"). I suggest only that, assuming such an attack were permitted, respondent could show no violation of any personal right in this case.

lected body. That conclusion is not, as the Court erroneously suggests, compelled by precedent; equally important, it seriously disserves the public interest.

The cases on which the Court relies involved relatively brief lapses of time between the defendant's trial and the granting of relief. This fact is unsurprising, since the Court only recently determined that claims of grand jury discrimination may be raised in federal habeas corpus proceedings. See *Rose* v. *Mitchell*, 443 U. S. 545 (1979).[10] Prior to 1970, the Court's grand jury discrimination cases arose on direct appeal from conviction. In all of those cases, the time between the defendant's indictment and this Court's decision was six years or less.[11] Before today, the Court has twice

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[10] In my separate opinion in *Rose* v. *Mitchell*, I took the position that, where a habeas petitioner is given a full opportunity to litigate his grand jury discrimination claim in state court, he should not be permitted to litigate the claim again on federal habeas corpus. 443 U. S., at 579 (POWELL, J., concurring in judgment). I remain convinced that my conclusion was correct. Nor do I believe that in this case *stare decisis* weighs persuasively against reexamining the question whether a defendant should be permitted to relitigate a claim that has no bearing on either his guilt or on the fairness of the trial that convicted him. *Rose* v. *Mitchell*, decided in 1979, is the only case in which this Court has examined the issue, and *Rose*'s authority is questionable. See n. 4, *supra*.

JUSTICE O'CONNOR has some doubt as to whether respondent had a full and fair opportunity to litigate his grand jury discrimination claim in a state court. *Ante*, at 267 (O'CONNOR, J., concurring in judgment). Respondent concedes that he did in fact relitigate that claim in state habeas corpus proceedings, Brief for Respondent 3, and appealed the denial of relief to the California Supreme Court. *Ibid.* In my view, this afforded respondent an entirely adequate opportunity to litigate in state courts both the underlying discrimination claim and the subsidiary claim that Judge Wingrove was a biased adjudicator.

It is unnecessary actually to decide the issue in this case, for I conclude that the judgment should be reversed on two other grounds: the harmlessness of the error, and the inappropriateness of the Court's remedy in cases in which the discrimination claim is raised so long after the claimant's conviction that retrial is difficult if not impossible.

[11] The longest time lapse occurred in *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). In *Strauder*, the defendant was indicted in October 1874; this Court's decision was rendered in March 1880.

granted relief to habeas corpus petitioners alleging grand jury discrimination. Both cases involved delays comparable to the delay reflected in the cases that arose on direct appeal. See *Castaneda* v. *Partida*, 430 U. S. 482 (1977) (decision announced five years after indictment); *Peters* v. *Kiff*, 407 U. S. 493 (1972) (decision announced six years after indictment).

This case raises the open question whether relief should be denied where the discrimination claim is pressed many years after conviction, and where the State can show that the delay prejudiced its ability to retry the defendant.[12] Respondent first raised his grand jury discrimination claim before a federal court 16 years after his conviction.[13] It is now almost a quarter-century since respondent was tried for murder and since the discrimination occurred. The Court finds this time lapse irrelevant. In my view, it is critically important, because it both increases the societal cost of the Court's chosen

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[12] The Court has decided only two cases in which the State might have argued that a long delay in raising a grand jury discrimination claim prejudiced the State's ability to retry the defendant. In both instances, the Court denied relief on other grounds. *Francis* v. *Henderson*, 425 U. S. 536 (1976) (petitioner raised grand jury discrimination claim seven years after conviction; Court denied relief on exhaustion grounds); *Tollett* v. *Henderson*, 411 U. S. 258 (1973) (petitioner raised grand jury claim 21 years after conviction; Court held that claim was foreclosed because petitioner had pleaded guilty pursuant to competent legal advice).

[13] The reason for this delay is irrelevant, unless bad faith on the State's part can be shown. Because respondent suffered no injury from Kings County's discriminatory selection of grand juries, he cannot fairly complain if he is required to raise his claim promptly in order to secure a windfall.

Moreover, respondent does not appear to have been blameless for the long delay. The California Supreme Court finally rejected respondent's grand jury discrimination claim in 1965. Respondent next raised the claim in 1974, when he sought postconviction relief in state court. During the intervening nine years, respondent raised repeated challenges—ultimately successfully—to his death sentence. There is no apparent reason why respondent could not simultaneously have sought postconviction relief on the grand jury discrimination claim, which if successful would require a new trial on guilt.

remedy and lessens any deterrent force the remedy may otherwise have.

In *Rose* v. *Mitchell*, *supra*, the Court reasoned that the rule of automatic reversal imposes limited costs on society, since the State is able to retry successful petitioners, and since "the State remains free to use all the proof it introduced to obtain the conviction in the first trial." *Id.*, at 558. This is not the case when relief is granted many years after the original conviction. In those circumstances, the State may find itself severely handicapped in its ability to carry its heavy burden of proving guilt beyond a reasonable doubt. Where the original verdict turned on the jury's credibility judgments, long delays effectively eliminate the State's ability to reconstruct its case. Even where credibility is not central, the passage of time may make the right to retry the defendant "a matter of theory only." Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 147 (1970). Witnesses die or move away; physical evidence is lost; memories fade. For these reasons, the Court has noted that "'[t]he greater the lapse of time, the more unlikely it becomes that the state could reprosecute if retrials are held to be necessary.'" *Peyton* v. *Rowe*, 391 U. S. 54, 62 (1968) (citation omitted).[14]

Long delays also dilute the effectiveness of the reversal rule as a deterrent. This case is illustrative. The architect of the discriminatory selection system that led to respondent's claim, Judge Wingrove, died 19 years ago. Respond-

[14] Under the Court's approach, one in respondent's position may be wise to wait to raise his discrimination claim until the State could no longer reconvict him due to the death or disappearance of witnesses or the loss of physical evidence. In effect, this strategy could permit a prisoner to commute a legally imposed sentence of life or long duration. This is a risk society should tolerate where the claim goes to the petitioner's guilt or innocence, or even where the claim seeks otherwise to redress a wrong done to the petitioner. But there is no reason to tolerate this risk where, as here, the claimant was fairly convicted and has suffered no prejudice from the asserted constitutional error.

ent does not allege that the discriminatory practices survived Judge Wingrove, nor is there any evidence in the record to support such an allegation. It is hard to believe that Judge Wingrove might have behaved differently had he known that a convicted defendant might be freed 19 years after his death. Yet that is exactly the proposition that must justify the remedy imposed in this case: that people in positions similar to Judge Wingrove's will change their behavior out of the fear of successful habeas petitions long after they have left office or otherwise passed from the scene. The proposition, to say the least, is highly questionable.

These concerns require that a different balance be struck in a case such as this one than in cases in which the grand jury discrimination claim is adjudicated only a short time after the petitioner's conviction. At the very least, the Court should focus directly on the aspect of delay that increases the costliness of its remedy by allowing the State to show that it would be substantially prejudiced in its ability to retry respondent.[15] If this showing were made, respondent's

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[15] The Court suggests that Rule 9(a) of the Habeas Corpus Rules, together with congressional inaction, "counsels against" considering prejudice to the State's ability to retry respondent in this case. *Ante*, at 265. This suggestion is erroneous. Rule 9 permits the State to defend against both repetitious habeas petitions, see *Woodard* v. *Hutchins*, 464 U. S. 377, 379 (1984) (POWELL, J., joined by BURGER, C. J., and BLACKMUN, REHNQUIST, and O'CONNOR, JJ., concurring), and petitions to which the State cannot adequately respond due to the petitioner's delay in filing, *e. g.*, *Mayola* v. *Alabama*, 623 F. 2d 992, 999–1000 (CA5 1980), cert. denied, 451 U. S. 913 (1981). The Rule does not by its terms foreclose other consideration of the lapse of time between the petitioner's conviction and the filing of the habeas petition. *Honeycutt* v. *Ward*, 612 F. 2d 36, 43 (CA2 1979) (Friendly, J., concurring in judgment), cert. denied, 446 U. S. 985 (1980). More important, it is a rule of habeas corpus procedure applicable to habeas petitions generally, and does not purport to be a rule of substantive law that defines particular substantive claims for relief. Congress' decision not to amend it therefore says nothing about Congress' intent with regard to the remedy applied here. In sum, the question whether the relief respondent seeks is "appropriate" in this case, *Hobby* v. *United States*, 468

petition for relief should be denied. Such an approach would also identify those cases in which granting habeas relief could be expected to have the least deterrent value: the State will likely suffer the greatest prejudice in cases of long delay, and those are the cases in which the automatic reversal rule is least likely to alter the behavior of discriminatory officials. This approach would leave the rule that the Court defends intact in precisely those cases where it does the most good and the least harm: cases in which the responsible officials are likely to be accountable for forcing the State to again prove its case, and in which retrial and reconviction are plausible possibilities.

III

Twenty-three years ago, respondent was fairly convicted of the most serious of crimes. Respondent's grand jury discrimination claim casts no doubt on the adequacy of the procedures used to convict him or on the sufficiency of the evidence of his guilt. For that reason alone, the Court should reverse the Court of Appeals' decision.[16] Even assuming the

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U. S. 339, 342 (1984), is governed neither by Rule 9 nor by Congress' decisions not to amend that Rule. See *Stone* v. *Powell*, 428 U. S. 465, 474–482 (1976) (discussing relationship between habeas corpus statute and the rule that evidence seized in violation of the Fourth Amendment is inadmissible). As the Court stated in *Fay* v. *Noia*, 372 U. S. 391, 438 (1963):

"[W]e recognize a limited discretion in the federal judge to deny [habeas corpus] relief to an applicant under certain circumstances. Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, 'dispose of the matter as law and justice require,' 28 U. S. C. § 2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles."

See also *Stone* v. *Powell*, *supra*, at 478, n. 11. Those "equitable principles" cannot, in my view, require that the Court apply a remedy that is not constitutionally compelled beyond the bounds of justice and good sense.

[16] Confidence in our system of justice is eroded when one found guilty of murder, in a trial conceded to be fair, is set free. It is important to remember that the criminal law's aim is twofold: "that guilt shall not escape

harmlessness of the error is irrelevant, however, reversal is still required. The Court inappropriately applies a deterrence rule in a context where it is unlikely to deter, and where its costs to society are likely to be especially high. These considerations should at least lead the Court to remand for a determination of whether the long lapse of time since respondent's conviction would prejudice the State's ability to retry respondent.

The Court follows neither of these paths, but instead affirms a decision that will likely mean that respondent must be freed for no good purpose. This result is not compelled by precedent. But if it were, its consequences would justify reconsidering those decisions thought to require it. I therefore dissent.

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or innocence suffer." *Berger* v. *United States*, 295 U. S. 78, 88 (1935); see also *United States* v. *Agurs*, 427 U. S. 97, 112 (1976). The Court's decision in this case plainly undermines the State's interest in punishing the guilty, without either protecting the innocent or ensuring the fundamental fairness of the procedures pursuant to which one such as respondent is tried and convicted.

WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* GREENFIELD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 84–1480. Argued November 13, 1985—Decided January 14, 1986

On three occasions shortly after his arrest in Florida for sexual battery, respondent was given *Miranda* warnings, and in each instance he exercised his right to remain silent and stated that he wished to speak with an attorney before answering any questions. Respondent later pleaded not guilty by reason of insanity, and in the closing arguments in the Florida trial court, the prosecutor, over defense counsel's objection, reviewed police officer testimony as to the occasions on which respondent had exercised his right to remain silent, and suggested that respondent's repeated refusals to answer questions without first consulting an attorney demonstrated a degree of comprehension that was inconsistent with his claim of insanity. Respondent's subsequent conviction was affirmed by the Florida Court of Appeal, which held that the general rule precluding prosecutorial comment as to a defendant's exercise of his right to remain silent did not apply to a case in which an insanity plea was filed. Respondent then unsuccessfully sought habeas corpus relief in Federal District Court, but the Court of Appeals reversed, holding that under the reasoning of *Doyle* v. *Ohio*, 426 U. S. 610, respondent was entitled to a new trial.

Held: The prosecutor's use of respondent's postarrest, post-*Miranda* warnings silence as evidence of sanity violated the Due Process Clause of the Fourteenth Amendment. Pp. 289–295.

(a) In *Doyle*, *supra*, it was held that the prosecutor's impeachment of the defendants' exculpatory testimony by asking them on cross-examination why they had not explained their conduct at the time of their arrest was fundamentally unfair and therefore violated the Due Process Clause. The source of the unfairness was the implicit assurance contained in *Miranda* warnings that silence will carry no penalty. Pp. 289–291.

(b) There is no merit to the argument that *Doyle* does not control this case because proof of sanity is significantly different from proof of the commission of the underlying offense. The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair

to breach that promise by using silence to overcome a defendant's plea of insanity. *South Dakota* v. *Neville*, 459 U. S. 553, distinguished. Pp. 292–293.

(c) The argument that *Doyle* should not control this case because a suspect's comprehension of *Miranda* warnings, as evidenced by his silence, is far more probative of sanity than of commission of the underlying offense, is also unpersuasive. Such argument fails to meet the problem of fundamental unfairness that flows from the State's breach of its implied assurances. Pp. 293–294.

(d) A State's legitimate interest in proving that the defendant's behavior appeared to be rational at the time of his arrest can be served by carefully framed questions that avoid any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel. Pp. 294–295.

741 F. 2d 329, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. REHNQUIST, J., filed an opinion concurring in the result, in which BURGER, C. J., joined, *post*, p. 296.

Ann Garrison Paschall, Assistant Attorney General of Florida, argued the cause for petitioner. With her on the briefs was *Jim Smith*, Attorney General.

James D. Whittemore, by appointment of the Court, 472 U. S. 1006, argued the cause and filed a brief for respondent.*

JUSTICE STEVENS delivered the opinion of the Court.

Respondent entered a plea of not guilty by reason of insanity to a charge of sexual battery. At his trial in the Circuit Court for Sarasota County, Florida, the prosecutor argued that respondent's silence after receiving *Miranda* warnings was evidence of his sanity. The question presented is whether such use of a defendant's silence violates the Due Process Clause of the Fourteenth Amendment as construed in *Doyle* v. *Ohio*, 426 U. S. 610 (1976).

*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union by *Charles S. Sims* and *Jack D. Novik;* and for the Illinois Psychological Association by *Donald Paull* and *Marilyn Martin.*

I

The battery occurred in woods near a beach in the vicinity of Sarasota, Florida. After respondent released his victim, she drove directly to the police station to report the incident. Based on her description, Officer Pilifant identified respondent on the beach and placed him under arrest about two hours after the assault occurred. After handcuffing him, the officer gave respondent the warnings required by our decision in *Miranda* v. *Arizona*, 384 U. S. 436, 467–473 (1966). Specifically, Officer Pilifant stated:

> "You have a right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of these rights I have explained to you? Having these rights in mind do you wish to talk to us now?" App. 73.

Respondent replied by stating that he understood his rights and that he wanted to talk to an attorney before making any statement. The *Miranda* warnings were repeated by Officer Pilifant while driving to the police station and reiterated by Detective Jolley after they arrived at the station. Each time that respondent was asked "if he wished to give up the right to remain silent," he declined, stating that he wanted to talk to an attorney. App. 77.

Under Florida law, when a defendant pleads not guilty by reason of insanity and when his evidence is sufficient to raise a reasonable doubt about his sanity, the State has the burden of proving sanity beyond a reasonable doubt.[1] In his case in

[1] See *Farrell* v. *State*, 101 So. 2d 130, 133 (Fla. 1958) ("when there is testimony of insanity sufficient to present a reasonable doubt of sanity the presumption [of sanity] vanishes. The defendant is then entitled to an

chief, the prosecutor introduced the testimony of Officer Pilifant and Detective Jolley. They described the occasions on which respondent had exercised his right to remain silent and had expressed a desire to consult counsel before answering any questions. Both officers repeated the several colloquies with respondent. In his defense, respondent did not testify, but two psychiatrists expressed the opinion that he was a paranoid schizophrenic who had been unable to distinguish right from wrong at the time of the alleged offense. In rebuttal, the prosecutor relied on a third psychiatrist who expressed a contrary opinion.

In his closing argument, over defense counsel's objection, the prosecutor reviewed the testimony of Officer Pilifant and Detective Jolley and suggested that respondent's repeated refusals to answer questions without first consulting an attorney demonstrated a degree of comprehension that was inconsistent with his claim of insanity.[2] The jury found respondent guilty and the judge sentenced him to life imprisonment.

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acquittal if the state does not overcome the reasonable doubt"), cited in *Greenfield* v. *State*, 337 So. 2d 1021, 1023, n. 2 (Fla. App. 1976).

[2] He argued, in part:

"He goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them? Does he say 'what's going on?' No. He says 'I understand my rights. I do not want to speak to you. I want to speak to an attorney.' Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act. Even down—as going down [to] the car as you recollect Officer Pil[i]fant said he explained what Miranda rights meant and the guy said—and Mr. Greenfield said 'I appreciate that, thanks a lot for telling me that.' And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley—He's down there. He says, 'Have you been read your Miranda rights?' 'Yes, I have.' 'Do you want to talk?' 'No.' 'Do you want to talk to an attorney?' 'Yes.' And after he talked to the attorney again he will not speak. Again another physical overt indication by the defendant . . . .

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[Footnote 2 is continued on p. 288]

By a 2-to-1 vote, the Florida Court of Appeal for the Second District affirmed the conviction. *Greenfield* v. *State*, 337 So. 2d 1021 (1976). After noting that "prosecutorial comment relating to a defendant's insistence on his right to remain silent generally constitutes reversible error," *id.*, at 1022, the majority held that the general rule did not apply to a case in which an insanity plea had been filed. The dissenting judge suggested that the application of the general rule would not have prejudiced the prosecution because the "questions and answers could have been couched in such a manner as to permit the officer to convey to the jury the fact that the appellant carried on a perfectly rational conversation without specifically stating that he chose to avail himself of his right to remain silent." *Id.*, at 1023.

The Florida Supreme Court granted respondent's petition for certiorari and summarily remanded the case to the Court of Appeal for reconsideration in light of *Clark* v. *State*, 363 So. 2d 331 (1978), a case in which it had held that improper comment on a defendant's silence was constitutional error reviewable on appeal if an adequate contemporaneous objection was made either at the time the evidence was introduced or at the time of the prosecutor's comment. *Greenfield* v. *State*, 364 So. 2d 885 (1978). On reconsideration, the Court of Appeal adhered to its earlier decision.

Having exhausted his state remedies, respondent filed a petition for a writ of habeas corpus in the Federal District Court. The petition was referred to a Magistrate. The State argued that the silence issue was barred because respondent's counsel had failed to make an adequate objection. The Magistrate concluded that federal review of the claim was not foreclosed because counsel had objected to the prosecutor's closing argument and because the Florida Court of Appeal had rejected the claim on its merits. The

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"So here again we must take this in consideration as to his guilt or innocence, in regards to sanity or insanity." App. 96–98.

Magistrate, however, agreed with the Florida courts' disposition of the merits and recommended that the habeas corpus petition be denied. The District Court accepted that recommendation.[3]

The United States Court of Appeals for the Eleventh Circuit reversed. 741 F. 2d 329 (1984). Disagreeing with two other Federal Courts of Appeals[4]—but not with the position taken by the Florida Supreme Court in a case decided after this respondent had exhausted his state remedies, see *State* v. *Burwick*, 442 So. 2d 944 (1983), cert. denied, 466 U. S. 931 (1984)—the Court of Appeals held that under the reasoning of *Doyle* v. *Ohio*, 426 U. S. 610 (1976), respondent was entitled to a new trial. We agree.

II

In *Doyle*, the defendants had taken the witness stand and offered an exculpatory explanation for their participation in what the State's evidence had portrayed as a routine marihuana transaction. On cross-examination the prosecutor impeached their testimony by asking them why they had not explained their conduct at the time of their arrest. The Court held that such cross-examination was fundamentally unfair

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[3] The Florida Attorney General did not object to the Magistrate's conclusion that the Florida Court of Appeal had rejected respondent's claim on its merits. In his petition for rehearing in the United States Court of Appeals for the Eleventh Circuit, the Attorney General renewed the argument that the postarrest, post-*Miranda* warnings silence issue was barred by *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). He advances the same argument in this Court. However, as the Magistrate concluded, the Florida appellate court clearly addressed the issue on the merits. Thus, we must reject the Attorney General's argument. See *Ulster County Court* v. *Allen*, 442 U. S. 140, 149 (1979); *Mullaney* v. *Wilbur*, 421 U. S. 684, 704, n. (1975) (REHNQUIST, J., concurring). Cf. *Franks* v. *Delaware*, 438 U. S. 154, 161–162 (1978); *Raley* v. *Ohio*, 360 U. S. 423, 436–437 (1959); *Manhattan Life Insurance Co.* v. *Cohen*, 234 U. S. 123, 134 (1914).

[4] See *Sulie* v. *Duckworth*, 689 F. 2d 128 (CA7 1982), cert. denied, 460 U. S. 1043 (1983); *United States* v. *Trujillo*, 578 F. 2d 285 (CA10), cert. denied, 439 U. S. 858 (1978).

and therefore violated the Due Process Clause of the Fourteenth Amendment.

The source of the unfairness was the implicit assurance contained in the *Miranda* warnings "that silence will carry no penalty."[5] The critical importance of the implied promise that is conveyed to an arrested person by the *Miranda* warnings has been repeatedly confirmed in subsequent decisions. Thus, in *Fletcher* v. *Weir*, 455 U. S. 603, 606 (1982), we explained:

> "In *Jenkins* [v. *Anderson*, 447 U. S. 231 (1980)], as in other post-*Doyle* cases, we have consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him. In *Roberts* v. *United States*, 445 U. S. 552, 561 (1980), we observed that the

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[5] "Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. MR. JUSTICE WHITE, concurring in the judgment in *United States* v. *Hale*, [422 U. S.], at 182–183, put it very well:

"'[W]hen a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. . . . Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from *Miranda* warnings that this would not be the case.'" *Doyle* v. *Ohio*, 426 U. S., at 618–619 (footnotes omitted).

In *United States* v. *Hale*, 422 U. S. 171 (1975), the Court had held that the use of postarrest, post-*Miranda* warnings silence was impermissible in federal prosecutions. The Court based its holding on its supervisory power in federal proceedings and left open the constitutional question. JUSTICE WHITE's concurrence argued that the use violated due process, and it was that view the Court adopted in *Doyle*.

> postconviction, presentencing silence of the defendant did not resemble 'postarrest silence that may be induced by the assurances contained in *Miranda* warnings.' In *Jenkins*, we noted that the failure to speak involved in that case occurred before the defendant was taken into custody and was given his *Miranda* warnings, commenting that no governmental action induced the defendant to remain silent before his arrest. 447 U. S., at 239–240. Finally, in *Anderson* v. *Charles*, 447 U. S. 404, 407–408 (1980), we explained that use of silence for impeachment was fundamentally unfair in *Doyle* because '*Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him. . . . *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances.'"

Since *Fletcher*, moreover, we have continued to reiterate our view that *Doyle* rests on "the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." *South Dakota* v. *Neville*, 459 U. S. 553, 565 (1983).[6] *Doyle* and subsequent cases have thus made clear that breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires.[7]

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[6] That this "fundamental unfairness" derives from the implicit assurances of the *Miranda* warnings is supported by our holdings that due process is not violated by the impeachment use of pre-*Miranda* warnings silence, either before arrest, *Jenkins* v. *Anderson*, 447 U. S. 231 (1980), or after arrest, *Fletcher* v. *Weir*, 455 U. S. 603 (1982), or of post-*Miranda* warnings statements, *Anderson* v. *Charles*, 447 U. S. 404 (1980); nor is it violated by the use of a refusal to take a state test that does not involve *Miranda*-like warnings, *Neville*.

[7] Notably, the Court in *Doyle* did not rely on the contention that Ohio had violated the defendants' Fifth Amendment privilege against self-incrimination by asking the jury to draw an inference of guilt from the exercise of their constitutional right to remain silent. Cf. *Griffin* v. *Cali-*

The Florida Attorney General argues that *Doyle* does not control this case because proof of sanity is significantly different from proof of the commission of the underlying offense, and that the *Doyle* due process rationale thus does not apply. At the outset, we note that, in this case, unlike *Doyle* and its progeny, the silence was used as affirmative proof in the case in chief, not as impeachment.[8] The Florida Attorney General argues that an insanity defense should be viewed as an "affirmative defense," and that the use of silence to overcome an insanity defense should thus be viewed as impeachment. Without accepting that argument, or its characterization of the insanity defense,[9] we address the claim that the *Doyle* due process analysis should not prevent the use of post-*Miranda* warnings silence to overcome an insanity defense.

We find no warrant for the claimed distinction in the reasoning of *Doyle* and of subsequent cases. The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.

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fornia, 380 U. S. 609 (1965) (Fifth Amendment prohibits prosecutorial comment on defendant's refusal to testify).

[8] The constitutional violation might thus be especially egregious because, unlike *Doyle*, there was no risk "that exclusion of the evidence [would] merely provide a shield for perjury." 426 U. S., at 626 (STEVENS, J., dissenting).

[9] Cf. n. 1, *supra*.

The Florida Attorney General argues, however, that introduction of the evidence of respondent's post-*Miranda* warnings silence no more violates the Constitution than did the reference to a defendant's refusal to take a blood-alcohol test in *South Dakota* v. *Neville*, *supra*. In *Neville*, we rejected the due process challenge—and the attempt to rely on *Doyle*—because of the important differences between the refusal to take a blood-alcohol test and the post-*Miranda* warnings silence. We noted that, unlike the refusal to take an optional blood-alcohol test, the right of silence after *Miranda* warnings is of constitutional dimension. 459 U. S., at 565. We also noted that, unlike the state warning about the refusal to take the blood-alcohol test (which expressly advised Neville that his refusal could be used to deprive him of his driving privileges), *Miranda* warnings contain implied assurances that silence will *not* be used against the suspect. 459 U. S., at 565–566. Both *Doyle* elements—the constitutional dimension and the implied assurance—are equally present when post-*Miranda* warnings silence is used to prove sanity. Unlike Neville, therefore, and like Doyle, Greenfield received "the sort of implicit promise to forgo use of evidence that would unfairly 'trick' [him] if the evidence were later offered against him at trial." 459 U. S., at 566.[10]

The Florida Attorney General further contends that a suspect's comprehension of *Miranda* warnings, as evidenced by his silence, is far more probative of sanity than of commission of the underlying offense. He therefore argues that the reliance on the "insolubly ambiguous" character of the post-*Miranda* warnings silence in the *Doyle* opinion, 426 U. S., at 617, is inappropriate in the context of an insanity defense. We need not evaluate the probative value of respondent's si-

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[10] To the extent that the Attorney General seeks to rely on *Neville*'s Fifth Amendment holding, his argument is inapposite because the *Doyle* analysis rests on the Due Process Clause, not the Fifth Amendment.

lence to reject this argument.[11] For the ambiguity of the defendants' silence in *Doyle* merely added weight to the Court's principal rationale, which rested on the implied assurance contained in the *Miranda* warning. See *South Dakota* v. *Neville*, 459 U. S., at 564–565; *Jenkins* v. *Anderson*, 447 U. S. 231, 239–240 (1980).[12] The Attorney General's argument about the probative value of silence therefore fails entirely to meet the problem of fundamental unfairness that flows from the State's breach of its implied assurances.

Finally, the Florida Attorney General argues that it is vitally important to be able to present evidence of a defendant's sanity at the time of the offense and shortly thereafter.

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[11] We note, however, that the Florida Supreme Court does not share the Florida Attorney General's view about the probative value of silence in an insanity context. As the Florida court wrote in *State* v. *Burwick*, 442 So. 2d 944, 948 (1983):

"Post-arrest, post-*Miranda* silence is deemed to have dubious probative value by reason of the many and ambiguous explanations for such silence. 422 U. S. at 180 . . . . Contrary to what *Greenfield* intimates, these ambiguities attendant to post-*Miranda* silence do not suddenly disappear when an arrestee's mental condition is brought into issue. The same evidentiary problems addressed by the Supreme Court in *Hale* are present in the case before us. For example, one could reasonably conclude that custodial interrogation might intimidate a mentally unstable person to silence. Likewise, an emotionally disturbed person could be reasonably thought to rely on the assurances given during a *Miranda* warning and thereafter choose to remain silent. In sum, just what induces post-arrest, post-*Miranda* silence remains as much a mystery today as it did at the time of the *Hale* decision. Silence in the face of accusation is an enigma and should not be determinative of one's mental condition just as it is not determinative of one's guilt. Accordingly, the state should not be permitted to confirm Burwick's mental state with evidence of his post-*Miranda* silence."

[12] Several commentators have also emphasized that, particularly in light of later cases, *Doyle*'s probativeness rationale is secondary to its implied assurance rationale. See, *e. g.*, Note, Protecting *Doyle* Rights After *Anderson* v. *Charles:* The Problem of Partial Silence, 69 Va. L. Rev. 155, 165, n. 56 (1983); Clark, Impeachment With Post-Arrest Silence: The Emergence of a "New Federalism" Approach, 19 Am. Crim. L. Rev. 751, 759 (1982); The Supreme Court, 1979 Term, 94 Harv. L. Rev. 77, 84–85 (1980).

However, as the dissenting judge in the Florida Court of Appeal recognized in this very case, the State's legitimate interest in proving that the defendant's behavior appeared to be rational at the time of his arrest could have been served by carefully framed questions that avoided any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel.[13] What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized.

In *Doyle*, we held that *Miranda* warnings contain an implied promise, rooted in the Constitution, that "silence will carry no penalty." 426 U. S., at 618. Our conclusion that it was fundamentally unfair for the Ohio prosecutor to breach that promise by using the defendants' postarrest, post-*Miranda* warnings silence to impeach their trial testimony requires us also to conclude that it was fundamentally unfair for the Florida prosecutor to breach the officers' promise to respondent by using his postarrest, post-*Miranda* warnings silence as evidence of his sanity.[14]

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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[13] In his petition and brief, the Attorney General has not contested the Eleventh Circuit's view that the prosecutorial comment was directed at the "defendant's post-*Miranda* warning silence," 741 F. 2d 329, 333 (1984), or its conclusion that this comment, if erroneous, was not harmless, *id.*, at 336. Nor has respondent contested the point that a prosecutor may legitimately inquire into and comment upon "purely 'demeanor' or 'behavior' evidence." Brief for Respondent 14. With respect to post-*Miranda* warnings "silence," we point out that silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted.

[14] This conclusion is supported by a number of state decisions, in addition to that of Florida. See *Commonwealth* v. *Mahdi*, 388 Mass. 679, 448 N. E. 2d 704 (1983); *People* v. *Vanda*, 111 Ill. App. 3d 551, 444 N. E. 2d 609 (1982), cert. denied, 464 U. S. 841 (1983); *People* v. *Schindler*, 114 Cal. App. 3d 178, 170 Cal. Rptr. 461 (1980).

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, concurring in the result.

I agree with the Court that our opinion in *Doyle* v. *Ohio*, 426 U. S. 610 (1976), shields from comment by a prosecutor a defendant's silence after receiving *Miranda* warnings, even though the comment be addressed to the defendant's claim of insanity. I write separately, however, to point out that it does not follow from this that the Court of Appeals, which took the same position, reached the correct result. That court expanded *Doyle* to cover not merely silence, but requests for counsel, and ignored the fact that the evidence upon which the prosecutor commented had been admitted without objection. Analyzed in these terms, the Court of Appeals' conclusion that the "error" was not harmless is suspect: The portion of the prosecutor's closing statement that the Court of Appeals held amounted to constitutional error was in large part unobjectionable from a constitutional point of view, and the officer's testimony relating to silence was already before the jury, without objection. I concur in the result reached today because one of the prosecutor's comments, however brief, was an improper comment on respondent's silence, and the State does not argue here that any error was harmless beyond a reasonable doubt.

In *Doyle*, the Court said:

> "The warnings mandated by *[Miranda]* . . . require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. . . . Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assur-

> ance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." 426 U. S., at 617–618 (footnotes omitted).

Doyle addressed the propriety of cross-examining defendants about their silence following *Miranda* warnings. Here the Court of Appeals assumed, without analysis, that respondent's conduct and statements following the warnings, such as his requests for a lawyer, should be treated the same as *silence*. I disagree. *Doyle* deemed silence "insolubly ambiguous"—the defendant may be indicating he has nothing to say in his defense, or he may be relying on the assurance that he has a right to remain silent. Similarly, a request for a lawyer has essentially no probative value where the question is one of guilt or innocence: No sensible person would draw an inference of guilt from a defendant's request for a lawyer after he had been told he had a right to consult one; it is simply not true that only a guilty person would want to have a lawyer present when being questioned by the police.

But a request for a lawyer may be highly relevant where the plea is based on insanity. There is no "insoluble ambiguity" in the request; it is a perfectly straightforward statement tending to show that an individual is able to understand his rights and is not incoherent or obviously confused or unbalanced. While plainly not conclusive proof of sanity, the request for a lawyer, like other coherent and responsive statements made near the time of the crime, is certainly relevant.*

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*It may be, as the Court suggests, that the prosecution could have served its legitimate purposes "by carefully framed questions that avoided any mention of the defendant's exercise of his constitutional righ[t] . . . to consult counsel," *ante*, at 295. That the prosecutor might have done things differently, however, does not render unconstitutional his express reference to respondent's invocation of his right to counsel. Indeed, I

Nor does the "unfairness" prong of *Doyle*, based on the implicit assurance in the *Miranda* warnings that "silence will carry no penalty," bar prosecutorial comment on respondent's requests for a lawyer. Officer Pilifant told respondent: "You have a right to remain silent. Anything you say can and will be used against you in a court of law." App. 73. The logical corollary of this warning—that what respondent *does* say *can* be used against him—is that what he does *not* say *cannot*.

Officer Pilifant's description of respondent's right to counsel was framed differently:

> "You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you wish." *Ibid.*

I do not read the foregoing statement as containing any promise, express or implied, that the words used in responding to notice of the right to a lawyer will not be used by the State to rebut a claim of insanity. In the absence of such a promise, respondent surely was not "tricked" into asking for a lawyer, and the prosecutor's reference to respondent's request was in no way "fundamentally unfair."

Nor do I believe that relevant comment about the invocation of the right to an attorney, made in an effort to defeat a claim of insanity, works the sort of "penalty" condemned in *Doyle*. Inviting the jury to draw an inference of guilt, which separates a defendant from the mass of society, is one thing; inviting it to draw an inference of sanity or rationality, which merely places a defendant together with the mass of society, is quite another. A suspect's right to an attorney during

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would think that quotation of a defendant's precise words is a far more effective means of disproving insanity than are general references to his "rationality" or "responsiveness."

questioning, which is derivative of his right to remain silent, see *Miranda* v. *Arizona*, 384 U. S. 436, 469–470 (1966), is not unconstitutionally burdened by use of his request as evidence of his ability to distinguish right from wrong.

Turning to the prosecutor's closing argument in this case, I believe that far less of what the Court of Appeals described as the "challenged portion" violated *Doyle* than did the Court of Appeals. That "challenged portion" consists of the following statement:

> "Let's go on to Officer Pilifant who took the stand, who the psychiatrists, both defense psychiatrists, never even heard about, never even talked to. He states that he saw this fellow [respondent] on the beach and that he went up to him, talked to him, and then arrested him for the offense. The fellow voluntarily put his arms behind his back and said he would go to the car. This is supposedly an insane person under the throws *[sic]* of an acute condition of schizophrenic paranoia at the time. He goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them? Does he say 'What's going on?' No. He says 'I understand my rights. I do not want to speak to you. I want to speak to an attorney.' Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act. Even down—as going down [to] the car as you recollect Officer Pil[i]fant said he explained what Miranda rights meant and the guy said—and Mr. Greenfield said 'I appreciate that, thanks a lot for telling me that.' And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley—He's down there. He says, 'Have you been read your Miranda rights?' 'Yes, I have.' 'Do you want to talk?' 'No.' 'Do you want to talk to an attorney?' 'Yes.' And after he talked to the

> attorney again he will not speak. Again another physical overt indication by the defendant . . . .
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> . . . . .
>
> "So here again we must take this in consideration as to his guilt or innocence, in regards to sanity or insanity." App. 96–98.

The first part of the statement describes, in the words of the arresting officer, prearrest conduct of the defendant. *Doyle* does not bar this sort of testimony. *Fletcher* v. *Weir*, 455 U. S. 603 (1982). When the defendant was read his *Miranda* rights, he did *not* remain silent; he said:

> "I understand my rights. I do not want to speak to you. I want to speak to an attorney. . . . [And then] I appreciate that, thanks a lot for telling me that."

Thus *Doyle* does not cover this portion of the closing argument either. While a defendant's invocation of his right to an attorney, or his statement that he understands (and appreciates being informed about) his rights, would be largely irrelevant in the case of most defenses, it is surely relevant in the context of a claim of insanity.

The only portion of the summation that can, in my opinion, be said to violate *Doyle* is the following:

> "[E]ven down at the station, according to Detective Jolley—He's down there. He says, 'Have you been read your Miranda rights?' 'Yes, I have.' 'Do you want to talk?' 'No.' 'Do you want to talk to an attorney?' 'Yes.' And after he talked to the attorney again he will not speak."

This is a comment on respondent's silence, and as such it constitutes a breach of the *Miranda* warning's "implied assurance" that his silence would not be used against him.

The Court of Appeals' determination that the prosecutor's error was not harmless was based on its apparent conclusion that all of the "challenged portion" of the prosecutor's state-

ment violated the constitutional rights of the defendant. The court stated:

> "The prosecutor relied strongly on [respondent's] *conduct* as evidence of sanity; his closing argument was not lengthy and the *portion challenged here* was not minor. We cannot say that the error was harmless beyond a reasonable doubt." 741 F. 2d 329, 336 (1984) (emphasis added).

But as noted above, actually a much smaller portion of this statement was constitutionally objectionable. And in evaluating whether or not this minute extract from the prosecutor's closing argument can be deemed harmless, I think an important factor apparently not considered by the Court of Appeals was that the testimony on which the summation was based had already come in without objection. It was there for the jury to consider on its own regardless of whether the prosecutor ever mentioned it. This fact, together with the brevity of the prosecutor's improper comment, at least suggests that the error was harmless beyond a reasonable doubt. See *Cupp* v. *Naughten*, 414 U. S. 141 (1973); *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974). As the Court points out, however, *ante*, at 295, n. 13, the Attorney General has not contested the Court of Appeals' conclusion that any error was not harmless. Accordingly, I concur in the result.

UNITED STATES *v.* LOUD HAWK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–1361. Argued November 12, 1985—Decided January 21, 1986

Respondents were arrested and indicted in November 1975 on counts of possessing firearms and dynamite. In March 1976, the Federal District Court granted respondents' motion to suppress evidence relating to the dynamite counts, and the Government promptly filed a notice of appeal and requested a continuance. The District Court denied this request and, when the Government answered "not ready" after the case was called for trial, dismissed the indictment. The Government appealed this dismissal, and the two appeals were consolidated. In August 1979, the Court of Appeals reversed the suppression order, ordered that the dynamite counts be reinstated, and held that the District Court erred in dismissing the firearms counts. In November 1979, respondents filed a petition for certiorari, which this Court denied. The Court of Appeals' mandate issued in March 1980, 46 months after the Government filed its notice of appeal from the dismissal of the indictment, during which time respondents were unconditionally released. On remand, the District Court ordered the Government to reindict on the firearms charges. In August 1980, the District Court granted a motion to dismiss on the ground of vindictive prosecution as to one respondent but denied it as to the other respondents, and both the Government and these respondents appealed. During these appeals, respondents remained free on their own recognizance. In July 1982, the Court of Appeals reversed the dismissal as to the one respondent and dismissed the appeals of the other respondents, and in October 1982 denied respondents' petitions for a rehearing. Respondents then filed a petition for certiorari, which this Court denied. The Court of Appeals' mandate issued in January 1983. In May 1983, the District Court again dismissed the indictment, ruling that respondents' Sixth Amendment right to a speedy trial had been violated. The Court of Appeals affirmed.

Held:

1. The time during which the indictment was dismissed and respondents were free of all restrictions on their liberty should be excluded from the length of delay considered under the Speedy Trial Clause of the Sixth Amendment. *United States* v. *MacDonald*, 456 U. S. 1. Pp. 310–312.

(a) Where no indictment is outstanding, it is only the actual restraints imposed by arrest and holding to answer a criminal charge that engages the protection of the Speedy Trial Clause. Here, respondents

were not incarcerated and were not subject to bail, and further judicial proceedings would have been necessary to subject them to any actual restraints. Pp. 310–311.

(b) The fact that the Government's desire to prosecute respondents was a matter of public record was insufficient to count the time in question toward a speedy trial claim. Nor does the fact that respondents were ordered to appear at the evidentiary hearing held on remand in the District Court during the first appeal constitute the sort of "actual restraint" required for application of the Speedy Trial Clause. And respondents' necessity to obtain counsel while their case was technically dismissed was not sufficient to trigger that Clause. Pp. 311–312.

2. The delay attributable to the interlocutory appeals does not weigh effectively towards respondents' claim under the Speedy Trial Clause. Under the balancing test of *Barker* v. *Wingo*, 407 U. S. 514, courts must accommodate the competing concerns of orderly appellate review and a speedy trial. Pp. 312–317.

(a) Three of the factors under *Barker*—the length of delay, the extent to which respondents have asserted their speedy trial rights, and the prejudice to respondents—fail to support a finding of a violation of the Speedy Trial Clause. Pp. 314–315.

(b) The remaining *Barker* factor, the reason for the delay, also fails to carry respondents' claims. The Government's first interlocutory appeal was justified where the Government could not have otherwise presented the issue relating to exclusion of the evidence on the dynamite counts, and the Government's appeal on this issue was strong. Similarly, the Government's second interlocutory appeal was justified because the Government could not have otherwise proceeded against the one respondent against whom the indictment was dismissed, and here too the Government's position was strong. Pp. 315–316.

(c) The delay from respondents' interlocutory appeals does not count toward their speedy trial claims. A defendant bears the heavy burden of showing an unreasonable delay caused by the prosecution in that appeal or a wholly unjustified delay by the appellate court. Pp. 316–317.

3. On the facts, the delays in question were not sufficiently long to justify dismissal of the case against respondents because of an alleged violation of the Speedy Trial Clause. P. 317.

741 F. 2d 1184, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 317.

Bruce N. Kuhlik argued the cause for the United States. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Trott, Deputy Solicitor General Frey,* and *Kathleen A. Felton.*

Kenneth Saul Stern, by appointment of the Court, 471 U. S. 1123, argued the cause for respondents. With him on the brief were *Tom Steenson, Ronald P. Schiffman,* and *Michael Timothy Bailey.**

JUSTICE POWELL delivered the opinion of the Court.

In this case we must decide, first, whether the Speedy Trial Clause of the Sixth Amendment[1] applies to time during which respondents were neither under indictment nor subjected to any official restraint, and, second, whether certain delays occasioned by interlocutory appeals were properly weighed in assessing respondents' right to a speedy trial. A divided panel of the Court of Appeals for the Ninth Circuit weighed most of the 90 months from the time of respondents' arrests and initial indictment in November 1975 until the District Court's dismissal of the indictment in May 1983 towards respondents' claims under the Speedy Trial Clause. We conclude that the time that no indictment was outstanding against respondents should not weigh towards respondents' speedy trial claims. We also find that in this case the delay attributable to interlocutory appeals by the Government and respondents does not establish a violation of the Speedy Trial

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**James W. Klein* filed a brief for the Public Defender Service for the District of Columbia as *amicus curiae* urging affirmance.

[1] The Speedy Trial Clause of the Sixth Amendment reads: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

The more stringent provisions of the Speedy Trial Act, 18 U. S. C. § 3161 *et seq.*, have mooted much litigation about the requirements of the Speedy Trial Clause as applied to federal prosecutions. The time devoted to pretrial appeals, however, is automatically excluded under the Act, §§ 3161(d)(2) and (h)(1)(E). These respondents must therefore seek any relief under the Speedy Trial Clause.

Clause. Accordingly, we reverse the holding of the Court of Appeals that respondents were denied their right to a speedy trial.

I

In view of the nature of respondents' claim, we state the factual and procedural history of this case in some detail. On November 14, 1975, pursuant to a tip from the Federal Bureau of Investigation, Oregon state troopers stopped two vehicles in search of several federal fugitives.[2] After an exchange of gunfire and a motor chase, state troopers captured all but one of the respondents, Dennis Banks.[3] Both vehicles were locked and impounded while federal and state authorities obtained search warrants.

Searches of the vehicles over the next two days disclosed 350 pounds of dynamite,[4] 6 partially assembled time bombs,

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[2] Dennis James Banks, one of the respondents in this action, was active in the American Indian Movement, and was a fugitive when these events occurred. The siege and occupation of Wounded Knee had taken place 60 months before, and the Federal Bureau of Investigation was tracking Banks and his party as fugitives from that affair. *United States* v. *Loud Hawk*, 628 F. 2d 1139, 1141 (CA9 1979). For a description of the battle of Wounded Knee and the resultant violence and death, see *United States* v. *Banks*, 383 F. Supp. 389 (SD 1974), appeal dism'd, 513 F. 2d 1329 (CA8 1975); *United States* v. *Banks*, 374 F. Supp. 321 (SD 1974); *United States* v. *Banks*, 368 F. Supp. 1245 (SD 1973).

[3] The Government represents that it would introduce evidence at trial showing that respondent Dennis Banks was the driver of one of the vehicles. Banks was not apprehended until January 26, 1976.

[4] Respondents still dispute any characterization of the destroyed evidence as dynamite. Brief in Opposition 4, and n. 4; Brief for Respondents 4, n. 5. The Court of Appeals wrote:

"Each of the seven boxes was marked 'High Explosives Dangerous' and on the side had the following markings:

"'50 lbs
Gelex 2 1 × 8
70% Strength
D73MAO 7B'

[Footnote 4 is continued on p. 306]

2,600 rounds of ammunition, 150 blasting caps, 9 empty hand grenades, and miscellaneous firearms.[5] Oregon law enforcement officers, apparently unaware of the evidentiary consequences, adhered to their usual policy and destroyed the dynamite. A federal agent present at the destruction photographed the explosions. *United States* v. *Loud Hawk*, 628 F. 2d 1139, 1142 (CA9 1979). State officials also preserved wrappers from the dynamite casings.

A federal grand jury indicted respondents on November 25, 1975, on charges of possessing firearms and explosives. Trial in the United States District Court for the District of Oregon was set for the week of February 9, 1976. On December 22, 1975, a grand jury returned a five-count superseding indictment. This indictment charged all respondents with three counts relating to possession and transportation in commerce of an unregistered destructive device (the dynamite counts) and two counts relating to unlawful possession of firearms (the firearms counts).

Two days later, respondents filed a motion to suppress all evidence concerning the dynamite, arguing that federal and state officials had intentionally and negligently destroyed the dynamite before the defense had the opportunity to examine it. After initially denying respondents' motion,[6] and after

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"together with the logo of the DuPont company prominently displayed. Inside were red cylindrical sticks with heavy wrapping paper covering the contents and marked:

"'Explosives Dangerous
Gelex 2
70% Strength
E I Dupont De Nemours & Co. (Inc.).'"

United States v. *Loud Hawk*, *supra*, at 1144–1145.

We follow the practice of the opinions discussing the issue and refer to the destroyed evidence as dynamite. 741 F. 2d 1184, 1187 (CA9 1984); *United States* v. *Loud Hawk*, *supra*, at 1143. Cf. *United States* v. *Banks*, 682 F. 2d 841, 843 (CA9 1982) ("explosive material").

[5] App. 40a–42a, and n. 4, 90a.

[6] The District Court denied the motion on January 21, 1976.

two continuances at respondents' behest,[7] the District Court granted respondents' motion to suppress on March 31, 1976. App. to Pet. for Cert. 157a. Three weeks later, the Government appealed the suppression order,[8] and moved that trial on all counts be continued pending the outcome of the appeal. The District Court denied the Government's request for a continuance, and when the case was called for trial, the Government answered "not ready." Pursuant to Federal Rule of Criminal Procedure 48(b), the District Judge dismissed the indictment with prejudice. Six months had passed since the original indictment.

The Government immediately appealed the dismissal, and the two appeals were consolidated. The Court of Appeals

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[7] On January 21, 1976, the District Court postponed trial until March 8, 1976, on respondents' motion. On respondents' motion and over the objection of the Government, on February 18, 1976, the District Court again continued trial until May 12, 1976. Record, Doc. Nos. 62, 64.

[8] The Government is permitted to pursue some interlocutory appeals under 18 U. S. C. § 3731. That section as then in effect read:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

"An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts *[sic]* suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

"The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

"Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

"The provisions of this section shall be liberally construed to effectuate its purposes."

heard argument on October 15, 1976, and a divided panel affirmed in an unreported opinion on July 26, 1977. App. to Pet. for Cert. 88a–118a. On the Government's motion, the court voted on October 17, 1977, to hear the case en banc. On March 6, 1978, the Court of Appeals en banc remanded for findings of fact on whether federal officials participated in the destruction of the dynamite and whether respondents were prejudiced by its destruction. The court retained jurisdiction over the appeal pending the District Court's findings. The District Court issued its findings on August 23, 1978, and the case returned to the Court of Appeals.

On August 7, 1979, the Court of Appeals reversed the suppression order and directed that the dynamite counts be reinstated. *United States* v. *Loud Hawk*, 628 F. 2d, at 1150. The court also held that although the Government could have gone to trial on the firearms counts pending the appeal, the District Court erred in dismissing those counts with prejudice. *Id.*, at 1151. The Court of Appeals denied respondents' petition for rehearing on October 1, 1979. Respondents petitioned for certiorari; we denied the petition on March 3, 1980. 445 U. S. 917. The mandate of the Court of Appeals issued on March 12, 1980, 46 months after the Government filed its notice of appeal from the dismissal of the indictment. Respondents were unconditionally released during that time.

Following remand, the District Court ordered the Government to reindict on the firearms charges.[9] Respondents filed a number of motions during June and July of 1980 in re-

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[9] App. 57. The Government obtained a new indictment from the grand jury that recharged with the original firearms count (although it substituted "receiving" for "transporting") and two of the original three dynamite device counts. The new indictment also charged the defendants with two new destructive device counts relating to a slightly different type of destructive device. It also charged respondent KaMook Banks with a new count of receiving firearms while under indictment for a felony.

sponse to the superseding indictment,[10] including a motion to dismiss for vindictive prosecution. On August 8, 1980, the District Court granted the vindictive prosecution motion as to KaMook Banks and denied it as to respondents Dennis Banks, Render, and Loud Hawk. Both sides appealed. Respondents remained free on their own recognizance during this appeal.

The appeals were consolidated, and the Court of Appeals ordered expedited consideration. The court heard argument on January 7, 1981, but did not issue its decision until July 29, 1982. The court sustained the Government's position on all issues. *United States* v. *Banks*, 682 F. 2d 841. Respondents' petitions for rehearing were denied on October 5, 1982. Respondents again petitioned for certiorari, and we denied the petition on January 10, 1983. 459 U. S. 1117. The Court of Appeals' mandate issued on January 31, 1983, almost 29 months after the appeals were filed.

The District Court scheduled trial to begin on April 11, 1983. The Government sought and received a continuance until May 3, 1983, because of alleged difficulties in locating witnesses more than seven years after the arrests. Subsequently, the court on its own motion continued the trial date until May 23, 1983, and then again rescheduled the trial for June 13. The record in this Court does not reveal the rea-

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[10] A listing of the relevant docket entries, *id.*, at 38–145, shows that the motions filed during this 4-week period included: motion for a transcript of a recently held hearing (June 24, 1980), *id.*, at 61; motion to dismiss counts three and four for insufficient allegations (July 7, 1980), *id.*, at 63; motion to suppress evidence of pretrial photographic identification and "Tainted Potential Courtroom Identification," *ibid.*; motion for change in jury selection procedure, *ibid.*; motion to dismiss because of the grand jury composition, *ibid.*; motion to dismiss for vindictive prosecution, *ibid.*; motion to dismiss for preindictment delay, *ibid.*; motion for disclosure and production (July 21, 1980), *id.*, at 64; motion for appointment of investigator at Government expense, *ibid.*; and third motion to dismiss for gross governmental misconduct, *ibid.* All motions except for KaMook Banks' vindictive prosecution motion were denied (Aug. 5, 1980). *Id.*, at 65–66.

sons for these latter two continuances. Defendants objected to each continuance.

On May 20, 1983, the District Court again dismissed the indictment, this time on the ground that respondents' Sixth Amendment right to a speedy trial had been violated. 564 F. Supp. 691. The Government appealed, and unsuccessfully urged the District Court to request that the Court of Appeals expedite the appeal. On its own motion the court treated the appeal as expedited, and heard argument on January 4, 1984. A divided panel affirmed on August 30, 1984. 741 F. 2d 1184.[11] We granted certiorari, 471 U. S. 1014 (1985), and now reverse.

II

The Government argues that under *United States* v. *MacDonald*, 456 U. S. 1 (1982), the time during which defendants are neither under indictment nor subject to any restraint on their liberty should be excluded—weighed not at all—when considering a speedy trial claim.[12] Respondents contend that even during the time the charges against them were dismissed, the Government was actively pursuing its case and they continued to be subjected to the possibility that bail might be imposed. This possibility, according to respondents, is sufficient to warrant counting the time towards a speedy trial claim.

The Court has found that when no indictment is outstanding, only the "*actual* restraints imposed by arrest and holding to answer a criminal charge . . . engage the particular protections of the speedy trial provision of the Sixth Amendment." *United States* v. *Marion*, 404 U. S. 307, 320 (1971)

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[11] The Ninth Circuit's holding conflicts with three other Circuits. See *United States* v. *Herman*, 576 F. 2d 1139, 1146 (CA5 1978); *United States* v. *Jackson*, 508 F. 2d 1001, 1004 (CA7 1975); *United States* v. *Bishton*, 150 U. S. App. D. C. 51, 54, 463 F. 2d 887, 890 (1972).

[12] In *MacDonald*, we held that where the Government has dismissed an indictment and the defendant is not subject to actual restraints on his liberty, the Speedy Trial Clause does not apply.

(emphasis added); see *MacDonald*, *supra*, at 9. As we stated in *MacDonald:* "The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." 456 U. S., at 8.

During much of the litigation, respondents were neither under indictment nor subject to bail.[13] Further judicial proceedings would have been necessary to subject respondents to any actual restraints. Cf. *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967). As we stated in *MacDonald:* "[W]ith no charges outstanding, personal liberty is certainly not impaired to the same degree as it is after arrest while charges are pending. After the charges against him have been dismissed, 'a citizen suffers no restraints on his liberty and is [no longer] the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer.'" 456 U. S., at 9.

Respondents argue that the speedy trial guarantee should apply to this period because the Government's desire to prosecute them was a matter of public record. Public suspicion, however, is not sufficient to justify the delay in favor of a defendant's speedy trial claim. We find that after the District Court dismissed the indictment against respondents and after respondents were freed without restraint, they were "in the same position as any other subject of a criminal investigation." *MacDonald*, *supra*, at 8–9. See *Marion*, *supra*, at 309. The Speedy Trial Clause does not purport to protect a defendant from all effects flowing from a delay before trial.

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[13] In those instances where the defendant is subject to incarceration or bail, the courts would have to engage in a balancing of the restrictions imposed and their effect on the defendant, the necessity for delay, and the length of delay, using the approach we have outlined below. *Infra*, at 315–316.

The Clause does not, for example, limit the length of a pre-indictment criminal investigation even though "the [suspect's] knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life." 456 U. S., at 9.

Nor does the fact that respondents were ordered to appear at the evidentiary hearing held on remand in the District Court during the first appeal—an appearance they waived—constitute the sort of "actual restraint" required under our precedents as a basis for application of the Speedy Trial Clause. Finally, we are not persuaded that respondents' need for counsel while their case was technically dismissed supports their speedy trial claim. Although the retention of counsel is frequently an inconvenience and an expense, the Speedy Trial Clause's core concern is impairment of liberty; it does not shield a suspect or a defendant from every expense or inconvenience associated with criminal defense.

We therefore find that under the rule of *MacDonald*, when defendants are not incarcerated or subjected to other substantial restrictions on their liberty, a court should not weigh that time towards a claim under the Speedy Trial Clause.

III

The remaining issue is how to weigh the delay occasioned by an interlocutory appeal when the defendant is subject to indictment or restraint. As we have recognized, the Sixth Amendment's guarantee of a speedy trial "is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States* v. *Ewell*, 383 U. S. 116, 120 (1966). These safeguards may be as important to the accused when the delay is occasioned by an unduly long appellate process as when the delay is caused by a lapse between the initial arrest and the drawing of a proper indictment, *Ewell*, *supra*, at

118–119, or by continuances in the date of trial, *Barker* v. *Wingo*, 407 U. S. 514, 517–518 (1972).

At the same time, there are important public interests in the process of appellate review. The assurance that motions to suppress evidence or to dismiss an indictment are correctly decided through orderly appellate review safeguards both the rights of defendants and the "rights of public justice." *Beavers* v. *Haubert*, 198 U. S. 77, 87 (1905). The legislative history of 18 U. S. C. § 3731 "makes it clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States* v. *Wilson*, 420 U. S. 332, 337 (1975).

It is, of course, true that the interests served by appellate review may sometimes stand in opposition to the right to a speedy trial. But, as the Court observed in *United States* v. *Ewell*, *supra*, at 121:

> "It has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events. . . . [This rule] has been thought wise because it protects the societal interest in trying people accused of crime, rather than granting them immunization because of legal error at a previous trial, and because it enhances the probability that appellate courts will be vigilant to strike down previous convictions that are tainted with reversible error. . . . These policies, so carefully preserved in this Court's interpretation given the Double Jeopardy Clause, would be seriously undercut by [an] interpretation given the Speedy Trial Clause [that raised a Sixth Amendment obstacle to retrial following successful attack on conviction]."

In *Barker*, we adopted a four-part balancing test to determine whether a series of continuances infringed upon the defendant's right to a speedy trial. 407 U. S., at 530. That test assessed the "[l]ength of delay, the reason for the

delay, the defendant's assertion of his right, and prejudice to the defendant." *Ibid* (footnote omitted). The *Barker* test furnishes the flexibility to take account of the competing concerns of orderly appellate review on the one hand, and a speedy trial on the other. We therefore adopt this functional test to determine the extent to which appellate time consumed in the review of pretrial motions should weigh towards a defendant's speedy trial claim. Under this test, we conclude that in this case the delays do not justify the "unsatisfactorily severe remedy of dismissal." *Id.*, at 522.

A

Barker's first, third, and fourth factors present no great difficulty in application. The first factor, the length of delay, defines a threshold in the inquiry: there must be a delay long enough to be "presumptively prejudicial." *Id.*, at 530. Here, a 90-month delay in the trial of these serious charges is presumptively prejudicial and serves to trigger application of *Barker*'s other factors. *Ibid.*

The third factor—the extent to which respondents have asserted their speedy trial rights—does not support their position. Although the Court of Appeals found that respondents have repeatedly moved for dismissal on speedy trial grounds, 741 F. 2d, at 1192, that finding alone does not establish that respondents have appropriately asserted their rights. We held in *Barker* that such assertions from defendants are "entitled to strong evidentiary weight" in determining whether their rights to a speedy trial have been denied. 407 U. S., at 531–532. These assertions, however, must be viewed in the light of respondents' other conduct.

Here, respondents' speedy trial claims are reminiscent of Penelope's tapestry.[14] At the same time respondents were making a record of claims in the District Court for speedy trial, they consumed six months by filing indisputably frivolous petitions for rehearing and for certiorari after this

[14] Homer, The Odyssey, Book II, lines 91–105 (R. Lattimore trans. 1965).

Court's decision in *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263 (1982) (federal courts without jurisdiction to hear defendant's interlocutory appeal from denial of motion to dismiss indictment). They also filled the District Court's docket with repetitive and unsuccessful motions. See, *e. g.*, n. 10, *supra*.

The Court of Appeals gave "little weight" to the fourth factor, prejudice to respondents. At most, the court recognized the possibility of "impairment of a fair trial that may well result from the absence or loss of memory of witnesses in this case." 741 F. 2d, at 1193. See *Barker*, 407 U. S., at 532. That possibility of prejudice is not sufficient to support respondents' position that their speedy trial rights were violated. In this case, moreover, delay is a two-edged sword. It is the Government that bears the burden of proving its case beyond a reasonable doubt. The passage of time may make it difficult or impossible for the Government to carry this burden.

B

The flag all litigants seek to capture is the second factor, the reason for delay. In *Barker*, we held that "different weights should be assigned to different reasons." *Id.*, at 531. While a "deliberate attempt to delay the trial in order to hamper the defense," would be weighed heavily against the Government, a delay from "overcrowded courts"—as was the situation here—would be weighed "less heavily." *Ibid.* Given the important public interests in appellate review, *supra*, at 313, it hardly need be said that an interlocutory appeal by the Government ordinarily is a valid reason that justifies delay. In assessing the purpose and reasonableness of such an appeal, courts may consider several factors. These include the strength of the Government's position on the appealed issue, the importance of the issue in the posture of the case, and—in some cases—the seriousness of the crime. *United States* v. *Herman*, 576 F. 2d 1139, 1146 (CA5 1978) (Wisdom, J.). For example, a delay resulting from an ap-

peal would weigh heavily against the Government if the issue were clearly tangential or frivolous. *Ibid.* Moreover, the charged offense usually must be sufficiently serious to justify restraints that may be imposed on the defendant pending the outcome of the appeal. *Ibid.*

Under *Barker*, delays in bringing the case to trial caused by the Government's interlocutory appeal may be weighed in determining whether a defendant has suffered a violation of his rights to a speedy trial. It is clear in this case, however, that respondents have failed to show a reason for according these delays any effective weight towards their speedy trial claims. There is no showing of bad faith or dilatory purpose on the Government's part. The Government's position in each of the appeals was strong, and the reversals by the Court of Appeals are prima facie evidence of the reasonableness of the Government's action. Moreover, despite the seriousness of the charged offenses, the District Court chose not to subject respondents to any actual restraints pending the outcome of the appeals.

The only remaining question is the weight to be attributed to delays caused by respondents' interlocutory appeals. In that limited class of cases where a pretrial appeal by the defendant is appropriate, see, *e. g.*, *Hollywood Motor Car Co.*, *supra*, at 265–266, delays from such an appeal ordinarily will not weigh in favor of a defendant's speedy trial claims. A defendant with a meritorious appeal would bear the heavy burden of showing an unreasonable delay caused by the prosecution in that appeal, or a wholly unjustifiable delay by the appellate court. A defendant who resorts to an interlocutory appeal normally should not be able upon return to the district court to reap the reward of dismissal for failure to receive a speedy trial. As one Court of Appeals has noted in the context of a District Court's consideration of pretrial motions:

> "Having sought the aid of the judicial process and realizing the deliberateness that a court employs in reaching a

> decision, the defendants are not now able to criticize the very process which they so frequently called upon." *United States* v. *Auerbach*, 420 F. 2d 921, 924 (CA5 1969), rehearing denied, 423 F. 2d 676, cert. denied, 399 U. S. 905 (1970).

In the present case, respondents' appeal was allowable under the law of the Ninth Circuit before our decision in *Hollywood Motor Car*, *supra*. But we find that their position was so lacking in merit that the time consumed by this appeal should not weigh in support of respondents' speedy trial claim. Nor do we weigh the additional delay of six months resulting from respondents' frivolous action in seeking rehearing and certiorari toward respondents' speedy trial claim. See *ibid.*, decided prior to these latter actions.

IV

We cannot hold, on the facts before us, that the delays asserted by respondents weigh sufficiently in support of their speedy trial claim to violate the Speedy Trial Clause. They do not justify the severe remedy of dismissing the indictment. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

The Court holds today that the Speedy Trial Clause of the Sixth Amendment does not apply to a Government appeal from a district court's dismissal of an indictment, unless the defendant is incarcerated or otherwise under restraint during that appeal. The majority supports this result by equating the present case to *United States* v. *MacDonald*, 456 U. S. 1 (1982). That analysis, however, both ignores the considerable differences between this case and *MacDonald* and gives short shrift to the interests protected by the Speedy Trial Clause. I further disagree with the majority's application

of *Barker* v. *Wingo*, 407 U. S. 514 (1972), to the remaining appellate delays in this case.

I

The majority concludes that when an appeal arises out of the district court's dismissal of an indictment, the lack of an outstanding indictment absolves the Government of its responsibility to provide a speedy trial. However, we have never conditioned Sixth Amendment rights solely on the presence of an outstanding indictment. Those rights attach to anyone who is "accused,"[1] and we have until now recognized that one may stand publicly accused without being under indictment. The majority offers two reasons for concluding that respondents did not enjoy the right to a speedy trial during the Government's appeals. First, respondents were suffering only "[p]ublic suspicion," *ante*, at 311, and not a formal accusation. Second, they were not subject to "actual restraints" on their liberty. Both of these rationales are seriously flawed.

A

In *United States* v. *Marion*, 404 U. S. 307 (1971), we held that the Speedy Trial Clause does not apply until the Government, either through arrest or indictment, asserts probable cause to believe that a suspect has committed a crime. Before that time the individual, while possibly aware of the Government's suspicion, is not "the subject of public accusation," *id.*, at 321, and his only protection against delay comes from the Due Process Clause and the applicable statute of limitations. The Court applied the same rationale in *MacDonald*, *supra*. In that case, military charges of murder against MacDonald, an Army officer, were dropped after an investigation. MacDonald was then given an honorable discharge, only to be indicted by a civilian grand jury nearly

[1] The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

four years later for the same murders. The Court held that this delay did not implicate the speedy trial right because "the Speedy Trial Clause has no application after the Government, acting in good faith, formally drops charges." *Id.*, at 7. The Court reasoned that after the termination of the first formal prosecution, MacDonald was "in the same position as any other subject of a criminal investigation," *id.*, at 8–9, and thus was no more an "accused" than was the defendant in *Marion* before his arrest.

The same cannot be said of respondents in the present case.[2] Unlike one who has not been arrested, or one who has had the charges against him dropped, respondents did not enjoy the protection of the statute of limitations while the Government prosecuted its appeals. That protection was an important aspect of our holding in *Marion* that prearrest delay is not cognizable under the Speedy Trial Clause. See 404 U. S., at 322–323. More importantly, in contrast to *MacDonald*, the Government has not "dropped" anything in

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[2] It is also instructive to compare the present case and *MacDonald* with respect to another Sixth Amendment right—the right to counsel. Surely a Government appeal under 18 U. S. C. § 3731 is a "critical stage" of the prosecution, implicating the Sixth Amendment right to counsel. Cf. *Evitts* v. *Lucey*, 469 U. S. 387 (1985) (defendant in state prosecution has due process right to effective assistance of counsel on appeal, whether counsel is retained or appointed). As during other critical stages, the defendant needs an attorney during a government appeal "as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence." *Ross* v. *Moffitt*, 417 U. S. 600, 610–611 (1974). Again, the contrast to *MacDonald* is striking. The defendant in that case would have had no Sixth Amendment right to counsel during the time between the dropping of the Army charges and the filing of the grand jury charges; that period was not a "critical stage" of a prosecution.

In *United States* v. *Gouveia*, 467 U. S. 180 (1984), we held that the Sixth Amendment right to counsel is satisfied in a narrower class of cases than the speedy trial right. It therefore defies logic to conclude that respondents could be protected by the former, but not the latter, during the Government's appeal.

this case.[3] There has been at all relevant times a case on a court docket captioned *United States* v. *Loud Hawk*—I can think of no more formal indication that respondents stand accused by the Government.

The majority argues that while "the Government's desire to prosecute [respondents] was a matter of public record," that desire constituted only "[p]ublic suspicion" that is insufficient to call Sixth Amendment rights into play, citing *Marion* and *MacDonald*. *Ante*, at 311. The reason that the Government's desire to prosecute in both of those cases did not constitute an "accusation," however, is that the Government had not yet formalized its commitment. Indeed, in *MacDonald*, the Government dismissed the murder charges because it "concluded that they were untrue," 456 U. S., at 10, n. 12, thus acknowledging that the first formal accusation had been a mistake and extinguishing the prior probable-cause determination. In the present case, the Government has made no such confession of error and continues to align its full resources against respondents in judicial proceedings.

The most telling difference between this case and *MacDonald*, however, is the fact that respondents' liberty could have been taken from them at any time during the Government's

[3] That neither Congress nor this Court has had any difficulty recognizing the fundamental difference between the Government's dismissal of an indictment and the court's dismissal, subject to appellate review, is clear from Federal Rule of Criminal Procedure 48. Subdivision (a) of that Rule permits the Government, with leave of court, to dismiss an indictment, and provides that when the indictment is dismissed, "the prosecution shall thereupon terminate." Subdivision (b) permits the district court to dismiss an indictment, but contains no language suggesting that such action brings the prosecution to an end—nor could it, because the court's dismissal is subject to the Government's statutory right to appeal.

Asking whether the indictment "exists" during the appeal, while interesting from the standpoint of ontology, is of limited practical help. Yet it is significant that in the *MacDonald* situation the Government must go back to the grand jury and seek reindictment. When the district court dismisses an indictment, on the other hand, the court of appeals can reinstate the indictment with the stroke of a pen.

appeal. One of the primary purposes of the speedy trial right, of course, is to prevent prolonged restraints on liberty, *id.*, at 8; *Barker* v. *Wingo*, 407 U. S., at 532, and the absence of any possibility of such restraints was a vital part of our *MacDonald* holding. See 456 U. S., at 9. In contrast, Congress has declared explicitly, in 18 U. S. C. §3731, that a person in respondents' position shall be subject to the same restraints as an arrested defendant awaiting trial.[4] Thus the District Court had the undoubted authority to condition respondents' release on the posting of bail, or indeed to keep them in jail throughout the appeal, see 18 U. S. C. §3142(e) (1982 ed., Supp. III). Respondents' release could have been accompanied by restrictions on travel, association, employment, abode, and firearms possession, or conditioned on their reporting regularly to law enforcement officers and/or keeping a curfew. See §3142(c). Considering all the circumstances, therefore, I believe that respondents' position is most closely analogous to that of a defendant who has been arrested but not yet indicted.

B

As if acknowledging that the delay in this case is more analogous to postarrest, preindictment delay than to prearrest delay, the majority concedes that had respondents been incarcerated or forced to post bond during the Government's appeals, the automatic exclusion rule of *MacDonald* would not apply. *Ante*, at 311, n. 13. Yet, inexplicably, the majority then suggests that the Speedy Trial Clause applies to postarrest, preindictment delay only when the defendant has been subjected to "'*actual* restraints,'" *ante*, at 310,

[4] Title 18 U. S. C. §3731 provides in pertinent part: "Pending the prosecution and determination of the appeal . . . the defendant shall be released in accordance with chapter 207 of this title." Chapter 207, 18 U. S. C. §§3141–3156, contains the procedures for pretrial release, and permits the district courts to impose various restraints pending trial. The Government concedes that respondents could have been incarcerated or put under other restraints during the Government's appeals. Tr. of Oral Arg. 6, 18.

quoting *Marion*, 404 U. S., at 320 (emphasis added by majority opinion). The majority completely misreads *Marion* while creating a rule that is flatly inconsistent with our prior holdings.

We held in *Marion* that prearrest delay is not cognizable under the Speedy Trial Clause, but we certainly did not disturb the settled rule that the Government's formal institution of criminal charges, whether through arrest or indictment, always calls the speedy trial right into play. See *id.*, at 316–319; see also *United States* v. *Gouveia*, 467 U. S. 180, 185–186 (1984). Although it specified detention and bail as possible deleterious effects of a formal criminal charge, *Marion* nowhere suggested that it is the restraints themselves, rather than the assertion of probable cause, that constitute an accusation. Nor did we hold that a criminal charge has less constitutional significance when a defendant is released on recognizance rather than on bail. See 404 U. S., at 321, n. 12. The majority identifies no logic or precedent supporting its novel conclusion that a defendant who is arrested and released on bail is "accused," while a defendant who is arrested and released without bail, on the same evidence, is not "accused."[5]

Indeed, we have rejected precisely the interpretation of *Marion* that the majority now adopts. In *Dillingham* v. *United States*, 423 U. S. 64 (1975) *(per curiam)*, we held that

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[5] It is worth noting that the Speedy Trial Act puts time limits on the Government beginning with "the date on which [the defendant] was arrested or served with a summons," 18 U. S. C. § 3161, without regard to the terms of the defendant's release.

Moreover, Federal Rule of Criminal Procedure 48(b), which "provides for enforcement of the [speedy trial] right," *Pollard* v. *United States*, 352 U. S. 354, 361, n. 7 (1957); see *Marion*, 404 U. S., at 319, states: "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, . . . the court may dismiss the indictment, information or complaint." That language clearly confers the same rights on a defendant who is arrested and unconditionally released as one who is released on conditions.

Marion does not require "actual prejudice" to invoke the speedy trial right for postarrest, preindictment delay. Such "actual prejudice" included the "actual restraints" that the majority now requires. The Court of Appeals in that case noted that the defendant was released on bond, but without any other restrictions, pending trial. After citing *Marion*, it held that "any increased strain on this man's life which followed his arrest . . . does not rise to the level of substantial actual prejudice." *United States* v. *Palmer*, 502 F. 2d 1233, 1237 (CA5 1974), rev'd *sub nom. Dillingham* v. *United States*, *supra*. We summarily rejected the "actual prejudice" rationale, and the majority gives no reason whatsoever for resurrecting it today.[6]

There can be no question that one who had been arrested and released under 18 U. S. C. § 3141(a) (1982 ed., Supp. III) would be entitled, under *Marion*, to the protections of the Speedy Trial Clause. Because respondents were by statute subject to the same restraints as that hypothetical defendant, I am at a loss to understand why they should enjoy less protection.

II

The majority also declines to hold the Government accountable for delay attributable to appeals during which respond-

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[6] Apparently relying on the fact that the defendant in *Dillingham* had to post a $1,500 bond, see 502 F. 2d, at 1234, the Government reads *Dillingham* to stand for the proposition that any restriction, no matter how insignificant, invokes the Speedy Trial Clause when no indictment is outstanding. See Tr. of Oral Arg. 19. Once again, neither the plain language of the Sixth Amendment nor any decision of this Court suggests this peculiar constitutional standard. Moreover, while an indictment and an arrest are comparable in that each one constitutes a formal assertion of probable cause, there is no such symmetry between an indictment and incarceration or posting of bond. Simply put, the position advanced by the Government and the majority lacks even internal consistency.

The only sensible reading of *Dillingham* is that actual restraints, like other types of prejudice to a defendant, are relevant to the speedy trial

ents were under indictment. In doing so the majority emphasizes the second *Barker* factor—the reason for the delay, see 407 U. S., at 530. Because it concludes that "[t]here is no showing of bad faith or dilatory purpose on the Government's part," the majority declines to accord any "effective weight" to this factor in the speedy trial balance. *Ante*, at 316. In reaching this conclusion, it virtually ignores the most obvious "reason for the delay" in this case—the fact that the Court of Appeals was unable to decide these appeals in a reasonably prompt manner.

In *Barker*, we explained the application of the "reason for the delay" factor as follows:

> "[D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." 407 U. S., at 531 (footnote omitted).

The majority's application of this factor to the appellate delays in this case makes Government misconduct or bad faith a virtual prerequisite to a finding of a speedy trial violation. Seizing upon the approach of some of the Courts of Appeals,[7] the majority analyzes the reason behind the appellate delay solely in terms of the reasonableness of the Government's behavior in taking and prosecuting the appeal. This approach is inconsistent with the policies behind the speedy trial right. We recognized in *Barker* that the right protects both the defendant's interest in fairness and society's interest in provid-

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balance, but are not prerequisites to application of the Speedy Trial Clause. See *Barker* v. *Wingo*, 407 U. S. 514, 533 (1972).

[7] See, *e. g.*, *United States* v. *Saintil*, 705 F. 2d 415 (CA11 1983); *United States* v. *Herman*, 576 F. 2d 1139 (CA5 1978).

ing swift justice. *Id.*, at 519. Courts as well as prosecutors must necessarily work to promote those interests if they are to have any vitality. Because it is the Government as a whole—including the courts—that bears the responsibility to provide a speedy trial, the prosecutor's good faith cannot suffice to discharge that responsibility.[8]

The Court of Appeals frankly admitted that "most of the delay must be attributed to the processes of this court," 741 F. 2d 1184, 1191 (CA9 1984), a conclusion that is difficult to escape. This case involves appeals from pretrial rulings. The Court of Appeals had every reason to know that these appeals should have been ruled upon as expeditiously as possible. See that court's Rule 20. Yet it took over five years for the Court of Appeals to decide two appeals, one of them "expedited." No complicated analysis is needed to identify the reason for the delay in this case.

I would hold, simply, that a nonfrivolous appeal by any party permits a *reasonable* delay in the proceedings. The number and complexity of the issues on appeal, or the number of parties, might permit a greater or lesser delay in a given case. The government, not the defendant, must suffer the ultimate consequences of delays attributable to "overcrowded courts," *ibid.*, even at the appellate level.[9] In the

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[8] This assumes, of course, that the defendant wants a speedy trial and is not intentionally hindering the government's attempt to provide one. That assumption may be open to question in this case. The majority points out that respondents' strategically timed demands for a speedy trial ring somewhat hollow in light of respondents' overall behavior during the litigation. Were that the basis for the Court's opinion, I might be able to accept a remand to the Court of Appeals for further consideration of that factor. I am unable, however, to agree with the majority's analysis of the second *Barker* v. *Wingo* factor.

[9] The majority's focus on the prosecution's, rather than the court's, contribution to the delay undoubtedly comes in part from a reluctance to permit district courts to tell a court of appeals, or possibly this Court, that it has taken too long to decide a case. However, appellate courts have no privilege to decline constitutional obligations. The appellate courts would be better advised to adopt procedures for the speedy resolution of interloc-

present case, the amount of time that the appeals consumed is patently unreasonable. I would therefore weigh the second *Barker* factor against the Government in this case.

III

The majority has seriously misapplied our precedents in concluding that delay resulting when the government appeals the dismissal of an indictment is excludable for speedy trial purposes unless the defendant is subjected to actual restraints during that appeal. Its application of *Barker* v. *Wingo* to this case also undercuts the very purpose of the speedy trial right. I respectfully dissent.

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utory criminal appeals than to force district courts into the uncomfortable position of dismissing indictments because of appellate delay.

DANIELS *v.* WILLIAMS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84–5872. Argued November 6, 1985—Decided January 21, 1986

Petitioner brought an action in Federal District Court under 42 U. S. C. § 1983, seeking to recover damages for injuries allegedly sustained when, while an inmate in a Richmond, Virginia, jail, he slipped on a pillow negligently left on a stairway by respondent sheriff's deputy. Petitioner contends that such negligence deprived him of his "liberty" interest in freedom from bodily injury "without due process of law" within the meaning of the Due Process Clause of the Fourteenth Amendment. The District Court granted respondent's motion for summary judgment, and the Court of Appeals affirmed.

Held: The Due Process Clause is not implicated by a state official's *negligent* act causing unintended loss of or injury to life, liberty, or property. Pp. 329–336.

(a) The Due Process Clause was intended to secure an individual from an abuse of power by government officials. Far from an abuse of power, lack of due care, such as respondent's alleged negligence here, suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Due Process Clause would trivialize the centuries-old principle of due process of law. *Parratt* v. *Taylor*, 451 U. S. 527, overruled to the extent that it states otherwise. Pp. 329–332.

(b) The Constitution does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. While the Due Process Clause speaks to some facets of the relationship between jailers and inmates, its protections are not triggered by lack of due care by the jailers. Jailers may owe a special duty of care under state tort law to those in their custody, but the Due Process Clause does not embrace such a tort law concept. Pp. 332–336.

748 F. 2d 229, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, POWELL, and O'CONNOR, JJ., joined. MARSHALL, J., concurred in the result. BLACKMUN, J., *post*, p. 336, and STEVENS, J., *post*, p. 336, filed opinions concurring in the judgment.

Stephen Allan Saltzburg argued the cause and filed briefs for petitioner.

James Walter Hopper argued the cause and filed a brief for respondent.

JUSTICE REHNQUIST delivered the opinion of the Court.

In *Parratt* v. *Taylor*, 451 U. S. 527 (1981), a state prisoner sued under 42 U. S. C. § 1983, claiming that prison officials had negligently deprived him of his property without due process of law. After deciding that § 1983 contains no independent state-of-mind requirement, we concluded that although petitioner had been "deprived" of property within the meaning of the Due Process Clause of the Fourteenth Amendment, the State's postdeprivation tort remedy provided the process that was due. Petitioner's claim in this case, which also rests on an alleged Fourteenth Amendment "deprivation" caused by the negligent conduct of a prison official, leads us to reconsider our statement in *Parratt* that "the alleged loss, even though negligently caused, amounted to a deprivation." *Id.*, at 536–537. We conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property.

In this § 1983 action, petitioner seeks to recover damages for back and ankle injuries allegedly sustained when he fell on a prison stairway. He claims that, while an inmate at the city jail in Richmond, Virginia, he slipped on a pillow negligently left on the stairs by respondent, a correctional deputy stationed at the jail. Respondent's negligence, the argument runs, "deprived" petitioner of his "liberty" interest in freedom from bodily injury, see *Ingraham* v. *Wright*, 430 U. S. 651, 673 (1977); because respondent maintains that he is entitled to the defense of sovereign immunity in a state tort suit, petitioner is without an "adequate" state remedy, cf. *Hudson* v. *Palmer*, 468 U. S. 517, 534–536 (1984). Accordingly, the deprivation of liberty was without "due process of law."

The District Court granted respondent's motion for summary judgment. A panel of the Court of Appeals for the Fourth Circuit affirmed, concluding that even if respondent could make out an immunity defense in state court, petitioner would not be deprived of a meaningful opportunity to present his case. 720 F. 2d 792 (1983). On rehearing, the en banc Court of Appeals affirmed the judgment of the District Court, but under reasoning different from that of the panel. 748 F. 2d 229 (1984). First, a 5–4 majority ruled that negligent infliction of bodily injury, unlike the negligent loss of property in *Parratt*, does not constitute a deprivation of any interest protected by the Due Process Clause. The majority therefore believed that the postdeprivation process mandated by *Parratt* for property losses was not required. Second, the en banc court unanimously decided that even if a prisoner is entitled to some remedy for personal injuries attributable to the negligence of state officials, *Parratt* would bar petitioner's claim if the State provided an adequate postdeprivation remedy. Finally, a 6–3 majority concluded that petitioner had an adequate remedy in state court, even though respondent asserted that he would rely on sovereign immunity as a defense in a state suit. The majority apparently believed that respondent's sovereign immunity defense would fail under Virginia law.

Because of the inconsistent approaches taken by lower courts in determining when tortious conduct by state officials rises to the level of a constitutional tort, see *Jackson* v. *Joliet*, 465 U. S. 1049, 1050 (1984) (WHITE, J., dissenting from denial of certiorari) (collecting cases), and the apparent lack of adequate guidance from this Court, we granted certiorari. 469 U. S. 1207 (1985). We now affirm.

In *Parratt* v. *Taylor*, we granted certiorari, as we had twice before, "to decide whether mere negligence will support a claim for relief under § 1983." 451 U. S., at 532. After examining the language, legislative history, and prior interpretations of the statute, we concluded that § 1983, un-

like its criminal counterpart, 18 U. S. C. § 242, contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right. *Id.*, at 534–535. We adhere to that conclusion. But in any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim. See, *e. g.*, *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977) (invidious discriminatory purpose required for claim of racial discrimination under the Equal Protection Clause); *Estelle* v. *Gamble*, 429 U. S. 97, 105 (1976) ("deliberate indifference" to prisoner's serious illness or injury sufficient to constitute cruel and unusual punishment under the Eighth Amendment).

In *Parratt*, before concluding that Nebraska's tort remedy provided all the process that was due, we said that the loss of the prisoner's hobby kit, "even though negligently caused, amounted to a deprivation [under the Due Process Clause]." 451 U. S., at 536–537. JUSTICE POWELL, concurring in the result, criticized the majority for "pass[ing] over" this important question of the state of mind required to constitute a "deprivation" of property. *Id.*, at 547. He argued that negligent acts by state officials, though causing loss of property, are not actionable under the Due Process Clause. To JUSTICE POWELL, mere negligence could not "wor[k] a deprivation in the *constitutional sense*." *Id.*, at 548 (emphasis in original). Not only does the word "deprive" in the Due Process Clause connote more than a negligent act, but we should not "open the federal courts to lawsuits where there has been no affirmative abuse of power." *Id.*, at 548–549; see also *id.*, at 545 (Stewart, J., concurring) ("To hold that this kind of loss is a deprivation of property within the meaning of the Fourteenth Amendment seems not only to trivialize, but grossly to distort the meaning and intent of the Constitution"). Upon reflection, we agree and overrule *Parratt* to the extent that it states that mere lack of due care by a state

official may "deprive" an individual of life, liberty, or property under the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property. *E. g.*, *Davidson* v. *New Orleans*, 96 U. S. 97 (1878) (assessment of real estate); *Rochin* v. *California*, 342 U. S. 165 (1952) (stomach pumping); *Bell* v. *Burson*, 402 U. S. 535 (1971) (suspension of driver's license); *Ingraham* v. *Wright*, 430 U. S. 651 (1977) (paddling student); *Hudson* v. *Palmer*, 468 U. S. 517 (1984) (intentional destruction of inmate's property). No decision of this Court before *Parratt* supported the view that negligent conduct by a state official, even though causing injury, constitutes a deprivation under the Due Process Clause. This history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, see Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 368 (1911), was "'intended to secure the individual from the arbitrary exercise of the powers of government,'" *Hurtado* v. *California*, 110 U. S. 516, 527 (1884) (quoting *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 244 (1819)). See also *Wolff* v. *McDonnell*, 418 U. S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government, *Dent* v. *West Virginia*, 129 U. S. 114, 123 (1889)"); *Parratt*, *supra*, at 549 (POWELL, J., concurring in result). By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, *e. g.*, *Rochin*, *supra*, it serves to prevent governmental power from being "used for purposes of oppression," *Murray's Les-*

see v. *Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856) (discussing Due Process Clause of Fifth Amendment).

We think that the actions of prison custodians in leaving a pillow on the prison stairs, or mislaying an inmate's property, are quite remote from the concerns just discussed. Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.

The Fourteenth Amendment is a part of a Constitution generally designed to allocate governing authority among the Branches of the Federal Government and between that Government and the States, and to secure certain individual rights against both State and Federal Government. When dealing with a claim that such a document creates a right in prisoners to sue a government official because he negligently created an unsafe condition in the prison, we bear in mind Chief Justice Marshall's admonition that "we must never forget, that it is *a constitution* we are expounding," *McCulloch* v. *Maryland*, 4 Wheat. 316, 407 (1819) (emphasis in original). Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that "'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States,'" *Paul* v. *Davis*, 424 U. S. 693, 701 (1976), quoted in *Parratt* v. *Taylor*, 451 U. S., at 544.

The only tie between the facts of this case and anything governmental in nature is the fact that respondent was a sheriff's deputy at the Richmond city jail and petitioner was an inmate confined in that jail. But while the Due Process Clause of the Fourteenth Amendment obviously speaks to some facets of this relationship, see, *e. g.*, *Wolff* v. *McDon-*

nell, *supra*, we do not believe its protections are triggered by lack of due care by prison officials. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner," *Estelle* v. *Gamble*, 429 U. S. 97, 106 (1976), and "false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official." *Baker* v. *McCollan*, 443 U. S. 137, 146 (1979). Where a government official's act causing injury to life, liberty, or property is merely negligent, "no procedure for compensation is *constitutionally* required." *Parratt*, *supra*, at 548 (POWELL, J., concurring in result) (emphasis added).[1]

That injuries inflicted by governmental negligence are not addressed by the United States Constitution is not to say that they may not raise significant legal concerns and lead to the creation of protectible legal interests. The enactment of tort claim statutes, for example, reflects the view that injuries caused by such negligence should generally be redressed.[2] It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns.

In support of his claim that negligent conduct can give rise to a due process "deprivation," petitioner makes several arguments, none of which we find persuasive. He states, for example, that "it is almost certain that *some* negligence claims are within § 1983," and cites as an example the failure of a State to comply with the procedural requirements of *Wolff* v. *McDonnell*, *supra*, before depriving an inmate of good-time credit. We think the relevant action of the prison

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[1] Accordingly, we need not decide whether, as petitioner contends, the possibility of a sovereign immunity defense in a Virginia tort suit would render that remedy "inadequate" under *Parratt* and *Hudson* v. *Palmer*, 468 U. S. 517 (1984).

[2] See, *e. g.*, the Virginia Tort Claims Act, Va. Code § 8.01–195.1 *et seq.* (1984), which applies only to actions accruing on or after July 1, 1982, and hence is inapplicable to this case.

officials in that situation is their deliberate decision to deprive the inmate of good-time credit, not their hypothetically negligent failure to accord him the procedural protections of the Due Process Clause. But we need not rule out the possibility that there are other constitutional provisions that would be violated by mere lack of care in order to hold, as we do, that such conduct does not implicate the Due Process Clause of the Fourteenth Amendment.

Petitioner also suggests that artful litigants, undeterred by a requirement that they plead more than mere negligence, will often be able to allege sufficient facts to support a claim of intentional deprivation. In the instant case, for example, petitioner notes that he could have alleged that the pillow was left on the stairs with the intention of harming him. This invitation to "artful" pleading, petitioner contends, would engender sticky (and needless) disputes over what is fairly pleaded. What's more, requiring complainants to allege something more than negligence would raise serious questions about what "more" than negligence—intent, recklessness, or "gross negligence"—is required,[3] and indeed about what these elusive terms mean. See Reply Brief for Petitioner 9 ("what terms like willful, wanton, reckless or gross negligence mean" has "left the finest scholars puzzled"). But even if accurate, petitioner's observations do not carry the day. In the first place, many branches of the law abound in nice distinctions that may be troublesome but have been thought nonetheless necessary:

> "I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized."

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[3] Despite his claim about what he might have pleaded, petitioner concedes that respondent was at most negligent. Accordingly, this case affords us no occasion to consider whether something less than intentional conduct, such as recklessness or "gross negligence," is enough to trigger the protections of the Due Process Clause.

LeRoy Fibre Co. v. *Chicago, M. & St. P. R. Co.*, 232 U. S. 340, 354 (1914) (Holmes, J., partially concurring).

More important, the difference between one end of the spectrum—negligence—and the other—intent—is abundantly clear. See O. Holmes, The Common Law 3 (1923). In any event, we decline to trivialize the Due Process Clause in an effort to simplify constitutional litigation.

Finally, citing *South* v. *Maryland*, 18 How. 396 (1856), petitioner argues that respondent's conduct, even if merely negligent, breached a sheriff's "special duty of care" for those in his custody. Reply Brief for Petitioner 14. The Due Process Clause, petitioner notes, "was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the crown." *Ingraham* v. *Wright*, 430 U. S., at 672–673. And *South* v. *Maryland* suggests that one such protection was the right to recover against a sheriff for breach of his ministerial duty to provide for the safety of prisoners in his custody. 18 How., at 402–403. Due process demands that the State protect those whom it incarcerates by exercising reasonable care to assure their safety and by compensating them for negligently inflicted injury.

We disagree. We read *South* v. *Maryland*, *supra*, an action brought under federal diversity jurisdiction on a Maryland sheriff's bond, as stating no more than what this Court thought to be the principles of common law and Maryland law applicable to that case; it is not cast at all in terms of constitutional law, and indeed could not have been, since at the time it was rendered there was no due process clause applicable to the States. Petitioner's citation to *Ingraham* v. *Wright* does not support the notion that all common-law duties owed by government actors were somehow constitutionalized by the Fourteenth Amendment. Jailers may owe a special duty of care to those in their custody under state tort law, see Restatement (Second) of Torts § 314A(4) (1965), but for the reasons previously stated we reject the contention that the

Due Process Clause of the Fourteenth Amendment embraces such a tort law concept. Petitioner alleges that he was injured by the negligence of respondent, a custodial official at the city jail. Whatever other provisions of state law or general jurisprudence he may rightly invoke, the Fourteenth Amendment to the United States Constitution does not afford him a remedy.

Affirmed.

JUSTICE MARSHALL concurs in the result.

JUSTICE BLACKMUN, concurring in the judgment.

I concur in the judgment. See my opinion in dissent in *Davidson* v. *Cannon*, *post*, p. 349.

JUSTICE STEVENS, concurring in the judgments.*

Two prisoners raise similar claims in these two cases. Both seek to recover for personal injuries suffered, in part, from what they allege was negligence by state officials. Both characterize their injuries as "deprivations of liberty" and both invoke 42 U. S. C. § 1983 as a basis for their claims.

Prisoner Roy Daniels was injured when he slipped on a newspaper and pillows left on a stairway in the Virginia jail where he is incarcerated; he alleges state negligence in the presence of the objects on the stairs. Prisoner Robert Davidson suffered injury when he was attacked by another inmate in the New Jersey prison where he is incarcerated; he alleges (and proved at trial) state negligence in the failure of prison authorities to prevent the assault after he had written a note expressing apprehension about the inmate who ultimately assaulted him. I agree with the majority that petitioners cannot prevail under § 1983. I do not agree, however, that it is necessary either to redefine the meaning of "deprive" in the Fourteenth Amendment,[1] or to repudiate

*[This opinion applies also to *Davidson* v. *Cannon et al.*, No. 84–6470, *post*, p. 344.]

[1] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U. S. Const., Amdt. 14.

the reasoning of *Parratt* v. *Taylor*, 451 U. S. 527 (1981), to support this conclusion.

We should begin by identifying the precise constitutional claims that petitioners have advanced. It is not enough to note that they rely on the Due Process Clause of the Fourteenth Amendment, for that Clause is the source of three different kinds of constitutional protection. First, it incorporates specific protections defined in the Bill of Rights. Thus, the State, as well as the Federal Government, must comply with the commands in the First[2] and Eighth[3] Amendments; so too, the State must respect the guarantees in the Fourth,[4] Fifth,[5] and Sixth[6] Amendments. Second, it contains a substantive component, sometimes referred to as "substantive due process," which bars certain arbitrary government actions "regardless of the fairness of the procedures used to implement them." *Ante*, at 331.[7] Third, it is a guarantee of fair procedure, sometimes referred to as "procedural due process": the State may not execute, imprison, or fine a defendant without giving him a fair trial,[8] nor may it take property without providing appropriate procedural safeguards.[9]

The type of Fourteenth Amendment interest that is implicated has important effects on the nature of the constitutional claim and the availability of § 1983 relief. If the claim is in

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[2] See, *e. g.*, *Douglas* v. *Jeannette*, 319 U. S. 157 (1943).

[3] See, *e. g*, *Robinson* v. *California*, 370 U. S. 660 (1962).

[4] See, *e. g.*, *Mapp* v. *Ohio*, 367 U. S. 643 (1961).

[5] See, *e. g.*, *Malloy* v. *Hogan*, 378 U. S. 1 (1964) (right to protection from compelled self-incrimination applies to States); *Benton* v. *Maryland*, 395 U. S. 784 (1969) (right to protection from double jeopardy applies to States).

[6] See, *e. g.*, *Duncan* v. *Louisiana*, 391 U. S. 145 (1968) (right to jury trial applies to States).

[7] See also *Moore* v. *East Cleveland*, 431 U. S. 494 (1977); *Youngberg* v. *Romeo*, 457 U. S. 307 (1982).

[8] See, *e. g.*, *Groppi* v. *Leslie*, 404 U. S. 496 (1972); *In re Oliver*, 333 U. S. 257 (1948).

[9] See, *e. g.*, *Fuentes* v. *Shevin*, 407 U. S. 67 (1972).

the first category (a violation of one of the specific constitutional guarantees of the Bill of Rights), a plaintiff may invoke § 1983 regardless of the availability of a state remedy.[10] As explained in *Monroe* v. *Pape*, 365 U. S. 167 (1961), this conclusion derives from the fact that the statute—the Ku Klux Act of 1871—was intended to provide a federal remedy for the violation of a federal constitutional right. Thus, when the Fourth Amendment is violated, as in *Pape*, the provision of an independent federal remedy under § 1983 is necessary to satisfy the purpose of the statute.

Similarly, if the claim is in the second category (a violation of the substantive component of the Due Process Clause), a plaintiff may also invoke § 1983 regardless of the availability of a state remedy.[11] For, in that category, no less than with the provisions of the Bill of Rights, if the Federal Constitution prohibits a State from taking certain actions "regardless of the fairness of the procedures used to implement them," the constitutional violation is complete as soon as the prohibited action is taken; the independent federal remedy is then authorized by the language and legislative history of § 1983.

A claim in the third category—a procedural due process claim—is fundamentally different. In such a case, the deprivation may be entirely legitimate—a State may have every right to discharge a teacher or punish a student—but the State may nevertheless violate the Constitution by failing to provide appropriate procedural safeguards. The constitutional duty to provide fair procedures gives the citizen the opportunity to try to prevent the deprivation from happening, but the deprivation itself does not necessarily reflect any

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[10] See, *e. g.*, *Monroe* v. *Pape*, 365 U. S. 167 (1961) (§ 1983 action for Fourth Amendment violation); *Smith* v. *Wade*, 461 U. S. 30 (1983) (§ 1983 action for Eighth Amendment violation). See generally *McNeese* v. *Board of Education*, 373 U. S. 668, 672 (1963) (§ 1983 is "supplementary to any remedy any State might have").

[11] Cf. *Parratt* v. *Taylor*, 451 U. S. 527, 545 (1981) (BLACKMUN, J., concurring); *Roe* v. *Wade*, 410 U. S. 113 (1973).

"abuse" of state power. Similarly, a deprivation may be the consequence of a mistake or a negligent act, and the State may violate the Constitution by failing to provide an appropriate procedural response. In a procedural due process claim, it is not the deprivation of property or liberty that is unconstitutional; it is the deprivation of property or liberty *without due process of law*—without adequate procedures.

Thus, even though the State may have every right to deprive a person of his property or his liberty, the individual may nevertheless be able to allege a valid § 1983 due process claim, perhaps because a predeprivation hearing must be held,[12] or because the state procedure itself is fundamentally flawed.[13] So too, even though a deprivation may be unauthorized, a procedural due process claim may be raised if it challenges the State's procedures for preventing or redressing the deprivation. However, a complaint does not state a valid procedural due process objection—and a valid § 1983 claim—if it does not include a challenge to the fundamental fairness of the State's procedures. In consequence, when a predeprivation hearing is clearly not feasible,[14] when the regime of state tort law provides a constitutionally unobjectionable system of recovery for the deprivation of property or liberty, and when there is no other challenge to the State's procedures, a valid § 1983 claim is not stated. For, unlike cases in the other two categories—those in which the alleged

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[12] See, *e. g.*, *Loudermill* v. *Cleveland Board of Education*, 470 U. S. 532 (1985); *Carey* v. *Piphus*, 435 U. S. 247 (1978); *Goss* v. *Lopez*, 419 U. S. 565 (1975). Cf. *Groppi*, *supra*.

[13] Cf. *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 436 (1982) (postdeprivation state remedy is inadequate when challenge is to "the state system itself"); *Baker* v. *McCollan*, 443 U. S. 137, 156 (1979) (STEVENS, J., dissenting).

[14] See *Hudson* v. *Palmer*, 468 U. S. 517, 533 (1984) ("[W]hen deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur"); *Parratt* v. *Taylor*, *supra*.

deprivation violates a substantive federal right—if a procedural due process claim lacks a colorable objection to the validity of the State's procedures, no constitutional violation has been alleged.[15]

Petitioners' claims are not of the first kind. Neither Daniels nor Davidson argues in this Court that the prison authorities' actions violated specific constitutional guarantees incorporated by the Fourteenth Amendment. Neither now claims, for instance, that his rights under the Eighth Amendment were violated. Similarly, I do not believe petitioners have raised a colorable violation of "substantive due process."[16] Rather, their claims are of the third kind: Daniels and Davidson attack the validity of the procedures that Virginia and New Jersey, respectively, provide for prisoners who seek redress for physical injury caused by the negligence of corrections officers.

I would not reject these claims, as the Court does, by attempting to fashion a new definition of the term "depriva-

[15] See *id.*, at 543–544.

[16] Davidson explicitly disavows a substantive due process claim. See Brief for Petitioner in No. 84–6470, p. 7 ("[P]etitioner frames his claim here purely in terms of procedural due process"). At oral argument, counsel for Daniels did suggest that he was pursuing a substantive due process claim. Tr. of Oral Arg. in No. 84–5872, p. 22. However, the Court of Appeals viewed Daniels' claim as a procedural due process argument, see 748 F. 2d 229, 230, n. 1 (CA4 1984) ("There is no claim of any substantive due process violation"), and Daniels did not dispute this characterization in his petition for certiorari or in his brief on the merits.

In any event, to the extent that petitioners' arguments about the special obligations of prison officials may be read as a substantive due process claim, I agree with the Court, *ante*, at 335–336, that the sheriff's "special duty of care" recognized in *South* v. *Maryland*, 18 How. 396 (1856), does not have its source in the Federal Constitution. In these circumstances, it seems to me, the substantive constitutional duties of prison officials to prisoners are defined by the Eighth Amendment, not by substantive due process. Cf. *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701, 719–721 (CA7 1973) (analyzing prison officials' responsibilities to prevent inmate assaults under the Eighth Amendment), cert. denied *sub nom. Gutierrez* v. *Department of Public Safety of Illinois*, 414 U. S. 1146 (1974).

tion" and excluding negligence from its scope. No serious question has been raised about the presence of "state action" in the allegations of negligence,[17] and the interest in freedom from bodily harm surely qualifies as an interest in "liberty." Thus, the only question is whether negligence by state actors can result in a deprivation. "Deprivation," it seems to me, identifies, not the actor's state of mind, but the victim's infringement or loss. The harm to a prisoner is the same whether a pillow is left on a stair negligently, recklessly, or intentionally; so too, the harm resulting to a prisoner from an attack is the same whether his request for protection is ignored negligently, recklessly, or deliberately. In each instance, the prisoner is losing—being "deprived" of—an aspect of liberty as the result, in part, of a form of state action.

Thus, I would characterize each loss as a "deprivation" of liberty. Because the cases raise only procedural due process claims, however, it is also necessary to examine the nature of petitioners' challenges to the state procedures. To prevail, petitioners must demonstrate that the state procedures for redressing injuries of this kind are constitutionally inadequate. Petitioners must show that they contain a defect so serious that we can characterize the procedures as fundamentally unfair, a defect so basic that we are forced to conclude that the deprivation occurred without due process.

Daniels' claim is essentially the same as the claim we rejected in *Parratt*. The Court of Appeals for the Fourth Circuit determined that Daniels had a remedy for the claimed negligence under Virginia law. Although Daniels vigorously argues that sovereign immunity would have defeated his claim, the Fourth Circuit found to the contrary, and it is our settled practice to defer to the Courts of Appeals on ques-

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[17] Respondents in *Davidson* do raise a state-action objection in one sentence, Brief for Respondents in No. 84–6470, p. 13, n., but that bare reference is inadequate to mount a challenge to the undisturbed District Court finding of state action.

tions of state law.[18] It is true that *Parratt* involved an injury to "property" and that Daniels' case involves an injury to "liberty," but, in both cases, the plaintiff claimed nothing more than a "procedural due process" violation. In both cases, a predeprivation hearing was definitionally impossible.[19] And, in both cases, the plaintiff had state remedies that permitted recovery if state negligence was established. Thus, a straightforward application of *Parratt* defeats Daniels' claim.

Davidson's claim raises a question not specifically addressed in *Parratt*. According to the Third Circuit, no state remedy was available because a New Jersey statute prohibits prisoner recovery from state employees for injuries inflicted by other prisoners. Thus, *Davidson* puts the question whether a state policy of noncompensability for certain types of harm, in which state action may play a role, renders a state procedure constitutionally defective. In my judgment, a state policy that defeats recovery does not, in itself, carry that consequence. Those aspects of a State's tort regime that defeat recovery are not constitutionally invalid, so long as there is no fundamental unfairness in their operation. Thus, defenses such as contributory negligence or statutes of limitations may defeat recovery in particular cases without raising any question about the constitutionality of a State's procedures for disposing of tort litigation. Similarly, in my judgment, the mere fact that a State elects to provide some of its agents with a sovereign immunity defense in certain cases does not justify the conclusion that its remedial system is constitutionally inadequate. There is no reason to believe that the Due Process Clause of the Fourteenth Amendment

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[18] See *Haring* v. *Prosise*, 462 U. S. 306, 314, n. 8 (1983); *Leroy* v. *Great Western United Corp.*, 443 U. S. 173, 181, n. 11 (1979); *Bishop* v. *Wood*, 426 U. S. 341, 345–347 (1976); *Propper* v. *Clark*, 337 U. S. 472, 486–487 (1949).

[19] It borders on the absurd to suggest that a State must provide a hearing to determine whether or not a corrections officer should engage in negligent conduct.

and the legislation enacted pursuant to §5 of that Amendment should be construed to suggest that the doctrine of sovereign immunity renders a state procedure fundamentally unfair.[20] Davidson's challenge has been only to the fact of sovereign immunity; he has not challenged the difference in treatment of a prisoner assaulted by a prisoner and a nonprisoner assaulted by a prisoner, and I express no comment on the fairness of that differentiation.

Thus, although I believe that the harms alleged by Daniels and proved by Davidson qualify as deprivations of liberty, I am not persuaded that either has raised a violation of the Due Process Clause of the Fourteenth Amendment. I therefore concur in the judgments.

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[20] In *Martinez* v. *California*, 444 U. S. 277 (1980), we held that California's immunity statute did not violate the Due Process Clause simply because it operated to defeat a tort claim arising under state law. The fact that an immunity statute does not give rise to a procedural due process claim does not, of course, mean that a State's doctrine of sovereign immunity can protect conduct that violates a federal constitutional guarantee; obviously it cannot, see *Martinez*, *supra*, at 284, n. 8, quoting *Hampton* v. *Chicago*, 484 F. 2d 602, 607 (CA7 1973), cert. denied, 415 U. S. 917 (1974).

DAVIDSON *v.* CANNON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-6470. Argued November 6, 1985—Decided January 21, 1986

When threatened by a fellow inmate in the New Jersey State Prison, petitioner sent a note reporting the incident to respondent Assistant Superintendent of the prison, who read the note and sent it to respondent Corrections Sergeant, who, while informed of its contents, did not read it or notify other officers of the threat and forgot about it by the time he went off duty. Two days later the inmate attacked petitioner and inflicted serious injuries. Petitioner then brought a damages action against respondents in Federal District Court under 42 U. S. C. § 1983, claiming that they had violated his rights under, *inter alia*, the Fourteenth Amendment by negligently failing to protect him from the other inmate. After a bench trial, the District Court awarded damages, holding that petitioner was deprived of his liberty interest in personal security as a result of respondents' negligence and that such deprivation was without due process because of a New Jersey statute that protects prison officials from liability for injuries caused by one prisoner to another. The Court of Appeals reversed.

Held: The protections of the Due Process Clause of the Fourteenth Amendment, whether procedural or substantive, are not triggered by lack of due care by prison officials. *Daniels* v. *Williams*, *ante*, p. 327. Respondents' lack of due care, while leading to serious injuries, simply does not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent. Pp. 347-348.

752 F. 2d 817, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *ante*, p. 336. BRENNAN, J., filed a dissenting opinion, *post*, p. 349. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 349.

James Douglas Crawford argued the cause and filed a brief for petitioner.

Madeleine Waters Mansier, Deputy Attorney General of New Jersey, argued the cause for respondents. With her on

the brief were *Irwin I. Kimmelman*, Attorney General, and *James J. Ciancia*, Assistant Attorney General.

Acting Solicitor General Fried argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Assistant Attorney General Willard, Deputy Solicitor General Geller, Barbara L. Herwig*, and *Douglas N. Letter.**

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner sued prison officials seeking damages under 42 U. S. C. § 1983 for injuries he suffered when they negligently failed to protect him from another inmate. On December 19, 1980, petitioner was threatened by one McMillian, a fellow inmate at the New Jersey State Prison at Leesburg. Petitioner sent a note reporting the incident that found its way to respondent Cannon, the Assistant Superintendent of the prison, who read the note and sent it on to respondent James, a Corrections Sergeant.† Cannon subsequently testified that he did not view the situation as urgent because on previous occasions when petitioner had a serious problem he had contacted Cannon directly.

James received the note at about 2 p.m. on December 19, and was informed of its contents. James then attended to other matters, which he described as emergencies, and left the note on his desk unread. By the time he left the prison that evening James had forgotten about the note, and since

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**Fred E. Inbau, James P. Manak, Wayne W. Schmidt, Daniel B. Hales*, and *Courtney E. Evans* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging affirmance.

†The note, addressed to a civilian hearing officer, said:

"When I went back to the unit after seeing you McMillian was on the steps outside the unit. When I was going past him he told me 'I'll fuck you up you old mother-fucking fag.' Go up to your cell, I be right there.

"I ignored this and went to another person's cell and thought about it. Then I figured I should tell you so 'if' anything develops you would be aware.

"I'm quite content to let this matter drop but evidently McMillian isn't.

"Thank you, R. Davidson." 752 F. 2d 817, 819 (CA3 1984).

neither he nor Cannon worked on December 20 or 21, the officers on duty at that time had not been informed of the threat. Petitioner took no steps other than writing the note to alert the authorities that he feared an attack, nor did he request protective custody. He testified that he did not foresee an attack, and that he wrote the note to exonerate himself in the event that McMillian started another fight. He also testified that he wanted officials to reprimand McMillian in order to forestall any future incident. On Sunday, December 21, McMillian attacked petitioner with a fork, breaking his nose and inflicting other wounds to his face, neck, head, and body.

Petitioner brought this § 1983 suit in the United States District Court for the District of New Jersey, claiming that respondents (and two others) had violated his constitutional rights under the Eighth and Fourteenth Amendments. After a bench trial, the District Court held that petitioner had not established an Eighth Amendment violation "because [respondents] did not act with deliberate or callous indifference to [petitioner's] needs and because the incident complained of was a single attack." App. 89. The court also found, however, that respondents "negligently failed to take reasonable steps to protect [petitioner], and that he was injured as a result." *Ibid.* Petitioner was thereby deprived, see *Parratt* v. *Taylor*, 451 U. S. 527, 536–537 (1981), of his liberty interest in personal security, see *Ingraham* v. *Wright*, 430 U. S. 651, 673 (1977); and because New Jersey law provides that "[n]either a public entity nor a public employee is liable for . . . any injury caused by . . . a prisoner to any other prisoner," N. J. Stat. Ann. § 59:5–2(b)(4) (1982), the court concluded that the deprivation was without due process. Petitioner was awarded compensatory damages of $2,000.

The Court of Appeals for the Third Circuit, hearing the case en banc, reversed. 752 F. 2d 817 (1984). While accepting the District Court's conclusion that respondents had been negligent, and agreeing that the attack on petitioner impli-

cated a recognized liberty interest, the majority held that respondents' negligence did not work a "deprivation" of that interest within the meaning of the Due Process Clause. The court conceded that language in *Parratt* supported the District Court's position that merely negligent conduct causing injury could constitute a Fourteenth Amendment "deprivation," but concluded that "*Parratt* does not so hold." 752 F. 2d, at 826. Accordingly, the court ruled that petitioner had failed to make out a violation of his procedural or substantive due process rights, stating that § 1983 provides no remedy "for the type of negligence found in this case." *Id.*, at 829.

Two judges who joined the majority opinion also wrote separately to suggest that even if respondents' negligence had "deprived" petitioner of liberty, the State's decision not to provide a remedy, in view of its strong interest in protecting its prison officials from liability, did not violate due process. Three judges dissented, essentially embracing the position of the District Court.

We granted certiorari, 471 U. S. 1134 (1985), and set this case for oral argument with *Daniels* v. *Williams*, *ante*, p. 327. Finding the principles enunciated in *Daniels* controlling here, we affirm.

In *Daniels*, we held that the Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty, or property. In other words, where a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required. In this case, petitioner does not challenge the District Court's finding that respondents "'did not act with deliberate or callous indifference to [petitioner's] needs,'" 752 F. 2d, at 820. Instead, he claims only that respondents "negligently failed to protect him from another inmate." Brief for Petitioner 2. *Daniels* therefore controls.

Respondents' lack of due care in this case led to serious injury, but that lack of care simply does not approach the sort

of abusive government conduct that the Due Process Clause was designed to prevent. *Daniels*, *ante*, at 331–333. Far from abusing governmental power, or employing it as an instrument of oppression, respondent Cannon mistakenly believed that the situation was not particularly serious, and respondent James simply forgot about the note. The guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials.

In an effort to limit the potentially broad sweep of his claim, petitioner emphasizes that he "does not ask this Court to read the Constitution as an absolute guarantor of his liberty from assault by a fellow prisoner, even if that assault is caused by the negligence of his jailers." Brief for Petitioner 17. Describing his claim as one of "procedural due process, pure and simple," *id.*, at 14, all he asks is that New Jersey provide him a remedy. But the Fourteenth Amendment does not require a remedy when there has been no "deprivation" of a protected interest. Petitioner's claim, based on respondents' negligence, is quite different from one involving injuries caused by an unjustified attack by prison guards themselves, see *Johnson* v. *Glick*, 481 F. 2d 1028 (CA2), (Friendly, J.), cert. denied *sub nom. John* v. *Johnson*, 414 U. S. 1033 (1973), or by another prisoner where officials simply stood by and permitted the attack to proceed, see *Curtis* v. *Everette*, 489 F. 2d 516 (CA3 1973), cert. denied *sub nom. Smith* v. *Curtis*, 416 U. S. 995 (1974). As we held in *Daniels*, the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials.

Accordingly, the judgment of the Court of Appeals for the Third Circuit is affirmed.

It is so ordered.

[For opinion of JUSTICE STEVENS concurring in the judgment, see *ante*, p. 336].

JUSTICE BRENNAN, dissenting.

I agree with the Court that merely negligent conduct by a state official, even though causing personal injury, does not constitute a deprivation of liberty under the Due Process Clause. I do believe, however, that official conduct which causes personal injury due to recklessness or deliberate indifference, does deprive the victim of liberty within the meaning of the Fourteenth Amendment.

As JUSTICE BLACKMUN persuasively demonstrates in his dissent, the record in this case strongly suggests that the prison officials' failure to protect petitioner from attack was reckless and not merely negligent. Accordingly, like JUSTICE BLACKMUN, I would vacate the judgment and remand this case so that the Court of Appeals may review the District Court's holding that respondents' conduct was not reckless.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, dissenting.

When the State of New Jersey put Robert Davidson in its prison, it stripped him of all means of self-protection. It forbade his access to a weapon. N. J. Dept. of Corrections Standards 251.4.a.201 and .202. It forbade his fighting back. Standards 251.4.a.002, .003, and .004. It blocked all avenues of escape. The State forced Davidson to rely solely on its own agents for protection. When threatened with violence by a fellow inmate, Davidson turned to the prison officials for protection, but they ignored his plea for help. As a result, Davidson was assaulted by another inmate. He suffered stab wounds on his face and body as well as a broken nose that required surgery.

The Court nevertheless excuses the prison officials from liability under 42 U. S. C. §1983, holding that because the officials were "merely negligent in causing the injury" there was no "deprivation" of liberty without due process of law.

Ante, at 347. It relies for this proposition and result on the easier companion case, *Daniels* v. *Williams*, *ante*, p. 327, which overrules in part *Parratt* v. *Taylor*, 451 U. S. 527 (1981). In *Daniels*, also a § 1983 suit, the Court holds that a pretrial detainee, allegedly injured when he slipped on a pillow negligently left on the jail stairs by a deputy, as a matter of law suffered no deprivation under the Fourteenth Amendment.

While I concur in the judgment in *Daniels*, I do not join the Court in extending that result to this case. It is one thing to hold that a commonplace slip and fall, or the loss of a $23.50 hobby kit, see *Parratt* v. *Taylor*, *supra*, does not rise to the dignified level of a constitutional violation. It is a somewhat different thing to say that negligence that permits anticipated inmate violence resulting in injury, or perhaps leads to the execution of the wrong prisoner, does not implicate the Constitution's guarantee of due process. When the State incarcerated Daniels, it left intact his own faculties for avoiding a slip and a fall. But the State prevented Davidson from defending himself, and therefore assumed some responsibility to protect him from the dangers to which he was exposed. In these circumstances, I feel that Davidson was deprived of liberty by the negligence of the prison officials. Moreover, the acts of the state officials in this case may well have risen to the level of recklessness. I therefore dissent.

I

Davidson broke up a fight between two other inmates. Two days later, on Friday, December 19, 1980, the three were brought before a prison disciplinary officer. Only one of the three, Gibbs, was found guilty of fighting. When Davidson and the other inmate, McMillian, returned to their unit, McMillian threatened Davidson. Davidson decided to report the threat, in part to exonerate himself in advance but primarily to get the prison officials to take precautions. App. 85 (District Court's findings of fact). See also *id.*, at

75. Accordingly, Davidson reported the threat to Officer Garcia. Because McMillian had a history of prison assaults and fighting, *id.*, at 33–34, 62, Garcia recognized the seriousness of McMillian's threats. Garcia had Davidson relate the incident in writing. He then took Davidson's note, and told Davidson to return to his unit.

Garcia delivered the note to respondent Cannon, Assistant Superintendent of the prison, and described its contents. Cannon did not think the threat serious because Davidson had not personally come to him to report it and because of the nature of the earlier fight. *Id.*, at 44, 46. Cannon nonetheless asked to speak to Davidson, but changed his mind when he learned that Davidson had already returned to his unit. *Id.*, at 42. Rather than take one of the usual preventive measures, such as separating the two inmates, placing Davidson in protective custody, or attempting to ascertain the gravity of the threat by talking to the two, *id.*, at 44, Cannon simply told Garcia to pass the note along to respondent James, a Corrections Sergeant in the Internal Affairs Unit. *Id.*, at 43.

Garcia followed Cannon's order, giving the note to James at approximately 2:15 p.m., and informing James that it concerned a threat to Davidson by McMillian. *Id.*, at 38–39. Because James was not ordered to act immediately, he decided there was no urgency. James also decided not to follow the normal procedure of interviewing the complainant. *Id.*, at 50. James had two other tasks that he considered to be of higher priority, *id.*, at 61—paperwork and a report of a knife in a cell. James described the latter as an emergency situation; he conceded, however, that that cell had been double locked so that it was secure. *Id.*, at 51. James' regular shift ended at 4 p.m., but he worked a second shift that night as Assistant Center Keeper until 10:30 p.m. The Center Keeper ordinarily investigates threats to inmates, but again James took no action on the threat to Davidson. *Id.*, at 54–55. The second shift was "normal and routine." *Id.*, at

59. James made at least two conscious decisions not to act on the note; by the time he left the prison, he had forgotten about it. *Ibid.* Had he remembered, he would have notified the weekend shift. *Id.*, at 59–60. A reported threat would not normally be ignored over the weekend. *Id.*, at 50.

Meanwhile, the prison authorities had been alerted to the potential violence through another channel. On Wednesday, December 17, Officer Gibson wrote a "Special Report" stating that an inmate source had told him the fight involving Davidson and McMillian was "not over yet." Gibson recommended keeping Davidson and Gibbs in the detention area for their own protection. *Id.*, at 80. This recommendation was apparently ignored, as both Davidson and McMillian remained in their regular unit.

Neither Cannon nor James worked during the weekend. *Id.*, at 48. On Sunday, December 21, McMillian attacked Davidson, *id.*, at 28, inflicting the injuries that gave rise to this suit.

II

The Court appears to recognize that the injuries to Davidson (as well as that to Daniels in the companion case, *ante*, p. 327) implicates the "liberty" protected by the Fourteenth Amendment. It is well established that this liberty includes freedom from unjustified intrusions on personal security. *Ingraham* v. *Wright*, 430 U. S. 651, 673–674 (1977). In particular, it includes a prisoner's right to safe conditions and to security from attack by other inmates. See *Youngberg* v. *Romeo*, 457 U. S. 307, 315–316 (1982).[1] Before a State can

[1] The Court in *Youngberg* v. *Romeo* held that an infringement of an institutionalized mental patient's liberty interest in safe conditions would not violate due process if it resulted from a professionally acceptable judgment concerning the conditions of confinement. The essence of Davidson's complaint, of course, is that the judgments made by respondents were not acceptable. *Youngberg*, in any event, is factually inapposite here, because Davidson—like Daniels—does not challenge the general conditions of his confinement.

deprive a prisoner of the liberty he retains after imprisonment, it must afford him constitutionally adequate procedures. *Vitek* v. *Jones*, 445 U. S. 480, 493–494 (1980).

Although Daniels' and Davidson's liberty interests were infringed, the Court holds that they were not "deprived" of liberty in the constitutional sense. In the past, we have held that the Fourteenth Amendment requires a "familiar *two-stage analysis:* We must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty or property.'" *Ingraham* v. *Wright*, 430 U. S., at 672 (emphasis added). If so, "we then must decide what procedures constitute 'due process of law.'" *Ibid.* But I agree with the Court that a deprivation of liberty under the Fourteenth Amendment generally requires more than a mere infringement of a liberty interest. I also agree that the purpose of the Fourteenth Amendment's Due Process Clause should guide our determination of what actions constitute a deprivation of liberty under the Clause. A deprivation must contain some element of abuse of governmental power, for the "touchstone of due process is protection of the individual against arbitrary action of government." *Wolff* v. *McDonnell*, 418 U. S. 539, 558 (1974). Finally, I agree that mere negligent activity *ordinarily* will not amount to an abuse of state power. Where the Court today errs, in my view, is in elevating this sensible rule of thumb to the status of inflexible constitutional dogma. The Court declares that negligent activity can *never* implicate the concerns of the Due Process Clause. I see no justification for this rigid view. In some cases, by any reasonable standard, governmental negligence is an abuse of power.[2] This is one of those cases.

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[2] It is important not to confuse negligence with the absence of deliberate action. Negligent acts are often deliberate. W. Prosser, D. Dobbs, W. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 31, p. 171 (5th. ed. 1984) (Prosser); see, *e. g.*, *The Germanic*, 196 U. S. 589 (1905). Respondents Cannon and James did not act inadvertently. They deliber-

It seems to me that when a State assumes sole responsibility for one's physical security and then ignores his call for help, the State cannot claim that it did not know a subsequent injury was likely to occur. Under such circumstances, the State should not automatically be excused from responsibility. In the context of prisons, this means that once the State has taken away an inmate's means of protecting himself from attack by other inmates, a prison official's negligence in providing protection can amount to a deprivation of the inmate's liberty, at least absent extenuating circumstances.[3] Such conduct by state officials seems to me to be the "arbitrary action" against which the Due Process Clause protects. The

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ately decided that the threat to Davidson was not serious. Whether conduct is denominated negligent or intentional can be a function of the likelihood that harm will occur. Where occurrence of the harm is substantially certain, the law imputes to the actor an intent to cause it. Restatement (Second) of Torts § 8A, Comment *b* (1965). Where harm is less certain, we may call the actor negligent. Prosser, *supra*, at 170. In some circumstances, the risk of injury is so high that the government's failure to make efforts to avoid the injury is unacceptable, even if its omission still might be categorized as negligence.

[3] *Estelle* v. *Gamble*, 429 U. S. 97, 106 (1976), is not to the contrary. In *Estelle*, the Court held that a valid Eighth Amendment claim based on a prison physician's diagnosis or treatment required an allegation of deliberate indifference rather than one of mere negligence. The requirement that deliberate indifference or wantonness be shown flows directly from the requirement of cruel and unusual conduct. The type of conduct about which the drafters of the Eighth Amendment were primarily concerned included " 'torture[s]' and other 'barbar[ous]' methods of punishment" (quotations and citation omitted). *Id.*, at 102. As is shown in the text, *infra*, the concerns underlying the Due Process Clause are broader than those underlying the Eighth Amendment.

A prison is not the only setting in which governmental negligence may amount to an abuse of power. If police officers arrest a motorist on the freeway and leave his young children alone in the car by the side of the road on a cold night, any resulting injury to the children might well constitute a "deprivation" within the meaning of the Fourteenth Amendment. Cf. *White* v. *Rochford*, 592 F. 2d 381 (CA7 1979).

officials' actions in such cases thus are not remote from the purpose of the Due Process Clause and § 1983.[4]

Moreover, this case does not raise the concern noted in *Daniels*, *ante*, at 332, that "[t]he only tie between the facts . . . and anything governmental in nature" is the identity of the parties. In *Daniels*, the negligence was only coincidentally connected to an inmate-guard relationship; the same incident could have occurred on any staircase. Daniels in jail was as able as he would have been anywhere else to protect himself against a pillow on the stairs. The State did not prohibit him from looking where he was going or from taking care to avoid the pillow.[5]

In contrast, where the State renders a person vulnerable and strips him of his ability to defend himself, an injury that results from a state official's negligence in performing his duty is peculiarly related to the governmental function. Negligence in such a case implicates the "'[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Monroe* v. *Pape*, 365 U. S. 167, 184 (1961), quoting *United States* v. *Classic*, 313 U. S. 299, 326 (1941). The deliberate decision not to protect Davidson from a known threat

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[4] In adopting the predecessor of § 1983, Congress sought a remedy "against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." *Monroe* v. *Pape*, 365 U. S. 167, 176 (1961) (emphasis in original).

[5] While negligence of prison officials can constitute a due process violation, general conditions of confinement do not ordinarily give rise to the increased standard of care discussed above. Prison conditions are typically part of the State's legitimate restraint of liberty as a function of punishing convicted persons. See *Rhodes* v. *Chapman*, 452 U. S. 337 (1981). "Traditionally, this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial." *Bell* v. *Wolfish*, 441 U. S. 520, 537 (1979). See also *Block* v. *Rutherford*, 468 U. S. 576 (1984).

was directly related to the often violent life of prisoners. And protecting inmates from attack is central to one of the State's primary missions in running a prison—the maintenance of internal security. See *Hudson* v. *Palmer*, 468 U. S. 517, 524 (1984).

The Fourteenth Amendment is not "trivialized," see *Daniels*, *ante*, at 332, by recognizing that in some situations negligence can lead to a deprivation of liberty. On the contrary, excusing the State's failure to provide reasonable protection to inmates against prison violence demeans both the Fourteenth Amendment and individual dignity.[6]

III

Even were I to accept the Court's rigid view of what constitutes a deprivation, I would not vote to affirm the judgment of the Court of Appeals. Although the District Court ruled that the prison officials' conduct here was not reckless, there is substantial reason to doubt that conclusion. Since the Court of Appeals did not review the recklessness holding, I would remand the case for that review.

The Court has previously indicated that prison officials act recklessly when they disregard the potential for violence between a known violent inmate and a known likely victim. In *Smith* v. *Wade*, 461 U. S. 30 (1983), the Court recognized that a prison guard had acted recklessly in placing a known violent inmate in a cell shared by the previously victimized plaintiff and another inmate, without attempting to locate an empty cell nearby. The plaintiff, who had recently been removed from protective custody, was assaulted by his cellmates. It is far from clear that the officials in the present case were any less reckless.

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[6]The Court's notion of trivialization is especially difficult to understand given its recognition that negligent behavior may violate other constitutional provisions. See *United States* v. *Leon*, 468 U. S. 897, 919–923, and n. 23 (1984) (Fourth Amendment).

Even if respondents' conduct ordinarily would be considered only negligent, the forewarning here changes the constitutional complexion of the case. When officials have actual notice of a prisoner's need for physical protection, "'administrative negligence can rise to the level of deliberate indifference to or reckless disregard for that prisoner's safety.'" *Layne* v. *Vinzant*, 657 F. 2d 468, 471 (CA1 1981), quoting *West* v. *Rowe*, 448 F. Supp. 58, 60 (ND Ill. 1978). See also *Matzker* v. *Herr*, 748 F. 2d 1142, 1149 (CA7 1984); *Miller* v. *Solem*, 728 F. 2d 1020, 1024–1025 (CA8), cert. denied, 469 U. S. 841 (1984). Cf. *Baker* v. *McCollan*, 443 U. S. 137, 148 (1979) (concurring opinion) (sheriff who failed to adopt procedures for identifying arrestees was negligent rather than reckless when he had not previously been notified of the legitimate need for or duty to adopt such procedures).

Respondents "had the responsibility to care for plaintiff's safety, actual notice of the threat by an inmate with a known history of violence, and an opportunity to prevent harm to plaintiff." App. 89 (District Court's conclusions of law). Both respondents knew that McMillian had threatened Davidson after the fight and that Davidson had reported the threat immediately. Although Cannon knew that McMillian was a troublemaker, *id.*, at 41, he nonetheless chose to think that the situation was not serious. *Id.*, at 42. Likewise, James decided to attend to other matters during the entire eight hours he worked after receiving the note. *Id.*, at 86–87. Cannon and James intentionally delayed protecting Davidson's personal security in the face of a real and known possibility of violence. See *Porm* v. *White*, 762 F. 2d 635, 636–638 (CA8 1985). Cf. *Estelle* v. *Gamble*, 429 U. S. 97, 104–105 (1976) (intentional delay in providing necessary medical care to seriously ill inmate can constitute deliberate indifference and thus violate the Eighth Amendment). Cannon did not check on what James had found; James turned his back on the violence brewing for the weekend. Yet the risk

that harm would occur was substantial and obvious. Respondents' behavior very well may have been sufficiently irresponsible to constitute reckless disregard of Davidson's safety.

Even if negligence is deemed categorically insufficient to cause a deprivation under the Fourteenth Amendment, recklessness must be sufficient. Recklessness or deliberate indifference is all that a prisoner need prove to show that denial of essential medical care violated the Eighth Amendment's ban on cruel and unusual punishments. See *Estelle* v. *Gamble*, 429 U. S., at 104. The Due Process Clause provides broader protection than does the Eighth Amendment, see, *e. g.*, *Bell* v. *Wolfish*, 441 U. S. 520 (1979); *Ingraham* v. *Wright*, 430 U. S. 651 (1977); *Wolff* v. *McDonnell*, 418 U. S., at 557–558; *Revere* v. *Massachusetts General Hospital*, 463 U. S. 239, 244 (1983), so a violation of the Due Process Clause certainly should not require a more culpable mental state.

IV

The deprivation of Davidson's liberty interest violated the Fourteenth Amendment if it occurred "without due process of law." That condition is clearly satisfied. In both *Parratt* and *Hudson*, the Court held that where a deprivation of property was caused by a random and unauthorized act of a state official, it was impracticable for the State to provide process in advance and the State could satisfy procedural due process by a meaningful postdeprivation remedy, such as a tort suit. *Parratt* v. *Taylor*, 451 U. S., at 541; *Hudson* v. *Palmer*, 468 U. S., at 520–521. Even assuming the same is true for deprivations of liberty, New Jersey has failed to provide a meaningful postdeprivation remedy. By statute, the State has ruled: "Neither a public entity nor a public employee is liable for . . . any injury caused by . . . a prisoner to any other prisoner." N. J. Stat. Ann. § 59:5–2(b)(4) (West 1982). The State acknowledges that it would have asserted the immunity statute as a defense to a state-court action and

that Davidson's complaint would have been dismissed before being heard on the merits. Brief for Respondents 34.

Conduct that is wrongful under § 1983 surely cannot be immunized by state law. A State can define defenses, including immunities, to state-law causes of action, as long as the state rule does not conflict with federal law. *Ferri* v. *Ackerman*, 444 U. S. 193, 198 (1979). But permitting a state immunity defense to control in a § 1983 action "'would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.'" *Martinez* v. *California*, 444 U. S. 277, 284, n. 8 (1980), quoting *Hampton* v. *Chicago*, 484 F. 2d 602, 607 (CA7 1973), cert. denied, 415 U. S. 917 (1974). It is irrelevant that state immunity as applied to defeat a state-law tort claim is constitutional, and may be construed as one aspect of the State's definition of a tort claim. See 444 U. S., at 281–282, and n. 5. Since § 1983 was designed to attack the misuse of state power, "government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms." *Scheuer* v. *Rhodes*, 416 U. S. 232, 243 (1974).

Strong federal interests argue for allowing Davidson to bring his suit in the face of the New Jersey statute. See *Ferri* v. *Ackerman*, 444 U. S., at 198, n. 13. First, "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." *Monroe* v. *Pape*, 365 U. S., at 196 (concurring opinion). Second, the legislative history of § 1983's predecessor makes clear that Congress intended to alter the federal-state relationship with respect to the protection of federal rights. "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972). In particular, Congress in-

tended "to provide a federal remedy where the state remedy . . . was not available in practice." *Monroe* v. *Pape*, 365 U. S., at 174.

Davidson has been denied "'an *opportunity* . . . granted at a meaningful time and in a meaningful manner' . . . 'for [a] hearing appropriate to the nature of the case.'" *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 437 (1982) (citations omitted) (emphasis in original). Lacking a meaningful post-deprivation remedy in state court, Davidson was deprived of his liberty without due process of law.

I therefore would reverse the judgment of the Court of Appeals and order that the District Court award of $2,000 be reinstated. If I agreed with the rigid rule announced in *Daniels*—which I do not—I would vacate the judgment and remand the case for review of the District Court's finding that the respondents' conduct was not reckless.

Syllabus

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM *v.* DIMENSION FINANCIAL CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 84–1274. Argued November 4, 1985—Decided January 22, 1986

Section 2(c) of the Bank Holding Company Act of 1956 defines "bank" as any institution "which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." In response to the increase in the number of arguably uncovered "nonbank banks"—such as institutions offering customers "NOW" (negotiable order of withdrawal) accounts, which function like traditional checking accounts but are subject to a seldom exercised right of the bank to require prior notice of withdrawal, and institutions offering "commercial loans substitutes" such as certificates of deposit and commercial paper—the Federal Reserve Board amended its "Regulation Y" to redefine a "bank" as any institution that (1) accepts deposits that "as a matter of practice" are payable on demand and (2) engages in the business of making "any loan other than a loan to an individual for personal, family, household, or charitable purposes," including "the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments." In consolidated cases challenging the amended Regulation Y, the Court of Appeals set aside the regulation.

Held: The Board did not act within its statutory authority in defining "banks" as it did. Pp. 366–375.

(a) The Board's definition of "demand deposit" is not an accurate or reasonable interpretation of § 2(c) of the Act. An institution that offers NOW accounts—even if it engages in commercial lending—is not a "bank" for the purposes of the Act because the requirement of prior notice of withdrawal withholds from the depositor any "legal right" to withdraw on demand. No amount of agency expertise can make the words "legal right" contained in § 2(c) mean a right to do something "as a matter of practice." Pp. 367–368.

(b) Nor is the Board's definition of "commercial loan" a reasonable interpretation of § 2(c), under which an institution, even if it accepts deposits that the depositor has a legal right to withdraw on demand, is not a bank unless it "engages in the business of making commercial loans." The term "commercial loan" is used in the financial community

to describe the direct loan from a bank to a business customer for the purpose of providing funds needed by the customer in its business. Money market transactions, which the Board characterizes as "commercial loan substitutes," do not fall within the commonly accepted definition of "commercial loans." Nothing in the statutory language or the legislative history indicates that the term "commercial loan" meant anything different from its accepted ordinary commercial usage. Pp. 368–373.

(c) The Board's new definition cannot be supported on the asserted basis that it falls within the Act's "plain purpose" of regulating institutions "functionally equivalent" to banks. The "plain purpose" of legislation is determined in the first instance with reference to the plain language of the statute itself. Here, rather than defining "bank" as an institution that offers the functional equivalent of banking services, Congress defined with specificity certain transactions that constitute banking subject to regulation. The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect Congress' will as expressed in the statute. Pp. 373–375.

744 F. 2d 1402, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which all other Members joined, except WHITE, J., who took no part in the consideration or decision of the case.

Michael Bradfield argued the cause for petitioner. With him on the briefs was *James V. Mattingly, Jr.*

Jeffrey S. Davidson argued the cause for respondents Dimension Financial Corp. et al. With him on the brief were *David G. Norrell, Glenn Summers,* and *William L. Mitchell. John D. Hawke, Jr.,* argued the cause for respondents American Financial Services Association et al. With him on the brief were *Leonard H. Becker, Douglas L. Wald,* and *Louis A. Hellerstein.**

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*Briefs of *amici curiae* urging reversal were filed for the Conference of State Bank Supervisors et al. by *Erwin N. Griswold, J. Thomas Cardwell, Laura N. Pringle,* and *James F. Bell;* and for the Independent Bankers Association of America by *Leonard J. Rubin.*

Briefs of *amici curiae* urging affirmance were filed for the United States by *Acting Solicitor General Fried, Acting Assistant Attorney General Willard, Deputy Solicitor General Claiborne, John F. Cordes, Freddi*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Federal Reserve Board acted within its statutory authority in defining "banks" under § 2(c) of the Bank Holding Company Act of 1956, 12 U. S. C. § 1841 *et seq.*, as any institution that (1) accepts deposits that "as a matter of practice" are payable on demand and (2) engages in the business of making "any loan other than a loan to an individual for personal, family, household, or charitable purposes" including "the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments." 12 CFR § 225.2(a)(1) (1985).

I

A

Section 2(c) of the Bank Holding Company Act defines "bank" as any institution "which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 70 Stat. 133, as amended, 12 U. S. C. § 1841(c).

This case is about so-called "nonbank banks"—institutions that offer services similar to those of banks but which until recently were not under Board regulation because they conducted their business so as to place themselves arguably outside the narrow definition of "bank" found in § 2(c) of the Act. Many nonbank banks, for example, offer customers NOW (negotiable order of withdrawal) accounts which function like conventional checking accounts but because of prior notice provisions do not technically give the depositor a "legal right to withdraw on demand." 12 U. S. C. § 1841(c)(1). Others offer conventional checking accounts, but avoid classification as "banks" by limiting their extension of commercial credit to

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Lipstein, and *Mary Ann Gadziala;* and for Sears, Roebuck and Co. et al. by *Theodore B. Olson, Philip M. Knox, Jr., David Shute*, and *Peter J. Wallison.*

the purchase of money market instruments such as certificates of deposit and commercial paper.

In 1984, the Board promulgated rules providing that nonbank banks offering the functional equivalent of traditional banking services would thereafter be regulated as banks. 49 Fed. Reg. 794. The Board accomplished this by amending its definition of a bank, found in "Regulation Y," in two significant respects. First, the Board defined "demand deposit" to include deposits, like NOW accounts, which are "as a matter of practice" payable on demand. 12 CFR § 225.2 (a)(1)(A) (1985). Second, the Board defined the "making of a commercial loan" as "any loan other than a loan to an individual for personal, family, household, or charitable purposes," including "the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments." 12 CFR § 225.2(a)(1)(B) (1985).

B

Cases challenging the amended Regulation Y were commenced in three Circuits and were consolidated in the United States Court of Appeals for the Tenth Circuit.[1] The Court of Appeals set aside both the demand deposit and commercial loan aspects of the Board's regulation. 744 F. 2d 1402 (1984). The court did not discuss the demand deposit regulation in detail, relying instead on the holding of an earlier Tenth Circuit case, *First Bancorporation* v. *Board of Governors*, 728 F. 2d 434 (1984). In *First Bancorporation*, the court noted that the statutory definition of demand deposit is a deposit giving the depositor "a *legal right* to withdraw on demand." The court recognized that "withdrawals from NOW accounts are in actual practice permitted on demand." *Id.*, at 436. But, since the depository institution retains a technical prior notice requirement it does not, for the pur-

[1] Cases filed in the United States Courts of Appeal for the Fourth and Sixth Circuits were transferred to the Tenth Circuit pursuant to 28 U. S. C. § 2112(a).

poses of Congress' definition of "bank," accept "deposits that the depositor has a legal right to withdraw on demand."

The Court of Appeals also concluded that the Board's new definition of "commercial loan" was at odds with the Act. The legislative history revealed that in passing § 2(c) Congress intended to exempt from Board regulation institutions whose only commercial credit activity was the purchase of money market instruments. Although agencies must be "able to change to meet new conditions arising within their sphere of authority," any expansion of agency jurisdiction must come from Congress and not the agency itself. 744 F. 2d, at 1409. Accordingly, the Court of Appeals invalidated the amended regulations.

We granted certiorari. 471 U. S. 1064 (1985). We affirm.

II

The Bank Holding Company Act of 1956, 12 U. S. C. § 1841 *et seq.*, vests broad regulatory authority in the Board over bank holding companies "to restrain the undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit." S. Rep. No. 91–1084, p. 24 (1970). The Act authorizes the Board to regulate "any company which has control over any bank." 12 U. S. C. § 1841(a)(1).

The breadth of that regulatory power rests on the Act's definition of the word "bank." The 1956 Act gave a simple and broad definition of bank: "any national banking association or any State bank, savings bank, or trust company." 12 U. S. C. § 1841(c) (1964 ed.). Experience soon proved that literal application of the statute had the unintended consequence of including within regulation industrial banks offering limited checking account services to their customers. These institutions accepted "'funds from the public that are, in actual practice, repaid on demand.'" Amend the Bank Holding Company Act of 1956: Hearings on S. 2253, S. 2418,

and H. R. 7371 before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 2d Sess., 447 (1966) (letter to the Committee from J. L. Robertson, Member, Federal Reserve Board). Although including these institutions within the bank definition was the "correct legal interpretation" of the 1956 statute, the Board saw "no reason in policy to cover such institutions under this act." *Ibid.* Congress agreed, and accordingly amended the statutory definition of a bank in 1966, limiting its application to institutions that accept "deposits that the depositor has a legal right to withdraw on demand."[2]

The 1966 definition proved unsatisfactory because it too included within the definition of "bank" institutions that did not pose significant dangers to the banking system. Because one of the primary purposes of the Act was to "restrain undue concentration of . . . commercial credit," it made little sense to regulate institutions that did not, in fact, engage in the business of making commercial loans. S. Rep. No. 91–1084, p. 24 (1970). Congress accordingly amended the definition, excluding all institutions that did not "engag[e] in the business of making commercial loans." Since 1970 the statute has provided that a bank is any institution that

> "(1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 U. S. C. § 1841(c).

III

In 1984, the Board initiated rulemaking to respond to the increase in the number of nonbank banks.[3] After hearing

[2] The Senate Report explained, "the bill redefines 'bank' as an institution that accepts deposits payable on demand (checking accounts), the commonly accepted test of whether an institution is a commercial bank so as to exclude institutions like industrial banks and nondeposit trust companies." S. Rep. No. 1179, 89th Cong., 2d Sess., 7 (1966).

[3] The Board explained that since 1980 a large number of insurance, securities, industrial, and commercial organizations have acquired Federal Deposit Insurance Corporation insured financial institutions that are the

views of interested parties, the Board found that nonbank banks pose three dangers to the national banking system. *First*, by remaining outside the reach of banking regulations, nonbank banks have a significant competitive advantage over regulated banks despite the functional equivalence of the services offered. *Second*, the proliferation of nonbank banks threatens the structure established by Congress for limiting the association of banking and commercial enterprises. See 12 U. S. C. § 1843(c)(8) (bank holding company can purchase nonbanking affiliate only if entity "closely related to banking"). *Third*, the interstate acquisition of nonbank banks undermines the statutory proscription on interstate banking without prior state approval. 49 Fed. Reg. 794, 835–836 (1984). Since the narrowed statutory definition required that both the demand deposit and the commercial loan elements be present to constitute the institution as a bank, the Board proceeded to amend Regulation Y redefining both elements of the test. We turn now to the two elements of this definition.

A

The Board amended its definition of "demand deposit" primarily to include within its regulatory authority institutions offering NOW accounts. A NOW account functions like a traditional checking account—the depositor can write checks that are payable on demand at the depository institution. The depository institution, however, retains a seldom exercised but nevertheless absolute right to require prior notice of withdrawal. Under a literal reading of the statute, the institution—even if it engages in full-scale commercial lending—is not a "bank" for the purposes of the Holding Company Act because the prior notice provision withholds from the depositor any "legal right" to withdraw on demand. The

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functional equivalent of banks. The Board also noted that the powers of previously unregulated industrial banks "have substantially expanded . . . making them for all intents and purposes banks" for the purposes of the Bank Holding Company Act. 49 Fed. Reg., at 834.

Board in its amended definition closes this loophole by defining demand deposits as a deposit, not that the depositor has a "legal right to withdraw on demand," but a deposit that "as a matter of practice is payable on demand."

In determining whether the Board was empowered to make such a change, we begin, of course, with the language of the statute. If the statute is clear and unambiguous "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.

Application of this standard to the Board's interpretation of the "demand deposit" element of § 2(c) does not require extended analysis. By the 1966 amendments to § 2(c), Congress expressly limited the Act to regulation of institutions that accept deposits that "the depositor has a legal right to withdraw on demand." 12 U. S. C. § 1841(c). The Board would now define "legal right" as meaning the same as "a matter of practice." But no amount of agency expertise—however sound may be the result—can make the words "legal right" mean a right to do something "as a matter of practice." A *legal* right to withdraw on demand means just that: a right to withdraw deposits without prior notice or limitation. Institutions offering NOW accounts do not give the depositor a legal right to withdraw on demand; rather, the institution itself retains the ultimate legal right to require advance notice of withdrawal. The Board's definition of "demand deposit," therefore, is not an accurate or reasonable interpretation of § 2(c).

B

Section 2(c) of the Act provides that, even if an institution accepts deposits that the depositor has a legal right to withdraw on demand, the institution is not a bank unless it "en-

gages in the business of making commercial loans." Under Regulation Y, "commercial loan" means "any loan other than a loan to an individual for personal, family, household, or charitable purposes," including "the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments."

The purpose of the amended regulation is to regulate as banks institutions offering "commercial loan substitutes," that is, extensions of credit to commercial enterprises through transactions other than the conventional commercial loan. In its implementing order, the Board explained that "it is proper to include these instruments within the scope of the term commercial loan as used in the Act in order to carry out the Act's basic purposes: to maintain the impartiality of banks in providing credit to business, to prevent conflicts of interest, and to avoid concentration of control of credit." 49 Fed. Reg., at 841.

As the Board's characterization of these transactions as "commercial loan substitutes" suggests,[4] however, money market transactions do not fall within the commonly accepted definition of "commercial loans." The term "commercial loan" is used in the financial community to describe the direct loan from a bank to a business customer for the purpose of providing funds needed by the customer in its business. The term does not apply to, indeed is used to distinguish, extensions of credit in the open market that do not involve close borrower-lender relationships. Cf. G. Munn & F. Garcia, Encyclopedia of Banking and Finance 607 (1983). These latter money market transactions undoubtedly involve the indi-

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[4]The Board stated in its implementing order that "commercial paper is an important substitute for commercial loans." 49 Fed. Reg., at 840, n. 34. See also *Citicorp*, 69 Fed. Res. Bull. 921, 922 (1983) ("[C]ommercial loans include such commercial loan substitutes as the purchase of commercial paper, bankers acceptances and certificates of deposit, and the sale of federal funds"); Hurley, The Commercial Paper Market, 63 Fed. Res. Bull. 525 (1977) ("[C]ommercial paper is an important substitute for bank credit").

rect extension of credit to commercial entities but, because they do not entail the face-to-face negotiation of credit between borrower and lender, are not "commercial loans."

This common understanding of the term "commercial loan" is reflected in the Board's own decisions. Throughout the 1970's the Board applied the term "commercial loan" to exclude from regulation institutions engaging in money market transactions. For example, in *D. H. Baldwin Co.*, 63 Fed. Res. Bull. 280 (1977), the Board noted that although savings and loans participated in the federal funds market and issued certificates of deposit, they were not "technically 'banks' for the purposes of the Act" because they did not make commercial loans. *Id.*, at 286. The Board recognized that savings and loans resembled banks but concluded that "the decision should be left to Congress whether, in light of the policies underlying the Bank Holding Company Act, such 'near-banks' should be treated as 'banks' or 'nonbanks.'" *Id.*, at 287. See also *American Fletcher Corp.*, 60 Fed. Res. Bull. 868, 869, and n. 8 (1974) (savings and loans participate in the federal funds market and offer certificates of deposit but may not be deemed "banks" within the meaning of the Act). In 1976, the Board's Legal Division found that broker call loans "do not appear to have the close lender-borrower relationship that is one of the characteristics of commercial loans." Letter to Michael A. Greenspan from Baldwin P. Tuttle, Deputy General Counsel, pp. 2–3 (Jan. 26, 1976) (App. 100A–101A). A 1981 internal memorandum summarized the Board's longstanding interpretation of the commercial loan definition:

> "The Board also has concluded that, although commercial in nature, the purchase of federal funds, money market instruments (certificates of deposit, commercial paper, and bankers acceptances) are not considered commercial loans *for the purposes of section 2(c) of the Act*, despite the fact that for other statutory and regulatory purposes these instruments may be considered commer-

> cial loans." Federal Reserve System, Office Correspondence (Feb. 10, 1981) (App. 97A) (emphasis in original).[5]

The Board now contends that the new definition conforms with the original intent of Congress in enacting the "commercial loan" provision. The provision, the Board argues, was a "technical amendment to the Act designed to create a narrowly circumscribed exclusion from the Act's coverage." Brief for Petitioner 41. The Board supports this revisionist view of the purpose of the "commercial loan" provision by citing a comment in the "legislative history" indicating that at the time the provision was enacted, it operated to exclude only one institution, the Boston Safe Deposit & Trust Co. The Board does not go so far as to claim that the commercial loan amendment was a private bill, designed only to exempt Boston Safe. It suggests, however, that because the amendment was prompted by the circumstances of one particular institution, the language "commercial loan" should be given something other than its commonly accepted meaning.

The statute by its terms, however, exempts from regulation *all* institutions that do not engage in the business of making commercial loans. The choice of this general language demonstrates that, although the legislation may have been prompted by the needs of one institution, Congress intended to exempt the class of institutions not making commercial loans. Furthermore, the legislative history supports this plain reading of the statute. The Senate Report explained:

> "The definition of 'bank' adopted by Congress in 1966 was designed to include commercial banks and exclude those institutions not engaged in commercial banking,

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[5] The Board contends that these decisions "represented a willingness by the Board to refrain from applying the full scope of the Act in conditions that did not appear to generate the potential for its evasion." 49 Fed. Reg., at 842. But the decisions themselves make no mention of such self-imposed restraint. Rather, the decisions represented the Board's interpretation of the meaning of the statute based on the language of the Act and the legislative history of its passage.

> since the purpose of the act was to restrain undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit. However, the Federal Reserve Board has noted that this definition may be too broad and may include institutions which are not in fact engaged in the business of commercial banking in that they do not make commercial loans. The committee, accordingly, adopted a provision which would exclude institutions that are not engaged in the business of making commercial loans from the definition of 'bank.'" S. Rep. No. 91–1084, p. 24 (1970).

The only reference to Boston Safe is in a lengthy banking journal article that Representative Gonzalez entered into the Congressional Record. See 116 Cong. Rec. 25846, 25848 (1970) (indicating that Boston Safe was "[v]irtually the only bank that does no commercial lending"). Such a passage is not "legislative history" in any meaningful sense of the term and cannot defeat the plain application of the words actually chosen by Congress to effectuate its will. Finally, even if the legislative history evidenced a congressional intent to exclude only Boston Safe, which it does not, the Board's expansive definition of "commercial loan" would be an unreasonable interpretation of the statute. At the time the commercial loan provision was enacted, Boston Safe did not "make commercial loans," but did purchase money market instruments such as certificates of deposit and commercial paper. Recognizing the common usage of the term "commercial loan" and the purpose of the 1970 amendment, the Board in 1972 advised Boston Safe that it was not, in fact, a bank for the purposes of the Bank Holding Company Act:

> "The Board understands that Boston Safe purchases 'money market instruments,' such as certificates of deposit, commercial paper, and bank acceptances. In the circumstances of this case, such transactions are not regarded as commercial loans for the purposes of the Act." Letter to Lee J. Aubrey, Vice President,

> Federal Reserve Bank of Boston, from Michael A. Greenspan, Assistant Secretary, Board of Governors, p. 2 (May 18, 1972) (App. 94A).

Nothing in the statutory language or the legislative history, therefore, indicates that the term "commercial loan" meant anything different from its accepted ordinary commercial usage. The Board's definition of "commercial loan," therefore, is not a reasonable interpretation of § 2(c).

C

Unable to support its new definitions on the plain language of § 2(c), the Board contends that its new definitions fall within the "plain purpose" of the Bank Holding Company Act. Nonbank banks must be subject to regulation, the Board insists, because "a statute must be read with a view to the 'policy of the legislation as a whole' and cannot be read to negate the plain purpose of the legislation." The plain purpose of the legislation, the Board contends, is to regulate institutions "functionally equivalent" to banks. Since NOW accounts are the functional equivalent of a deposit in which the depositor has a legal right to withdraw on demand and money market transactions involve the extension of credit to commercial entities, institutions offering such services should be regulated as banks.[6]

The "plain purpose" of legislation, however, is determined in the first instance with reference to the plain language of the statute itself. *Richards* v. *United States*, 369 U. S. 1, 9 (1962). Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the

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[6] In a related argument, the Board contends that it has the power to regulate these institutions under § 5(b), which provides that the Board may issue regulations "necessary to enable it to administer and carry out the purposes of this chapter and prevent evasions thereof." 12 U. S. C. § 1844(b). But § 5 only permits the Board to police within the boundaries of the Act; it does not permit the Board to expand its jurisdiction beyond the boundaries established by Congress in § 2(c).

problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Without doubt there is much to be said for regulating financial institutions that are the functional equivalent of banks. NOW accounts have much in common with traditional payment-on-demand checking accounts; indeed we recognize that they generally serve the same purpose. Rather than defining "bank" as an institution that offers the functional equivalent of banking services, however, Congress defined with specificity certain transactions that constitute banking subject to regulation. The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute.[7]

If the Bank Holding Company Act falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the Board or the courts, to address. Numerous proposals for legislative reform have been advanced to streamline the tremendously complex area of financial institution regulation. See, *e. g.*,

[7] The process of effectuating congressional intent at times may yield anomalies. In *TVA* v. *Hill*, 437 U. S. 153 (1978), for example, we were confronted with the explicit language of a statute that in application produced a curious result. Noting that nothing prohibited Congress from passing unwise legislation, we upheld the enforcement of the statute as Congress had written it. Congress swiftly granted relief to the petitioner in *Hill;* but it did so in a fashion that could not have been tailored by the courts. See Pub. L. 95–632, § 5, 92 Stat. 3760.

Blueprint for Reform: Report of the Task Group on Regulation of Financial Services (July 1984). Our present inquiry, however, must come to rest with the conclusion that the action of the Board in this case is inconsistent with the language of the statute for here, as in *TVA* v. *Hill*, 437 U. S. 153, 194 (1978), "[o]nce the meaning of an enactment is discerned . . . the judicial process comes to an end."

Affirmed.

JUSTICE WHITE took no part in the consideration or decision of this case.

CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. *v.* BULLOCK

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 84–1236. Argued November 5, 1985—Decided January 22, 1986

After respondent and his friend Tucker accepted Dickson's offer of a ride home, a fight developed between Tucker and Dickson, and Dickson stopped the car. Respondent held Dickson's head as Tucker struck Dickson in the face with a whiskey bottle. Tucker then pummeled Dickson with his fists until Dickson fell to the ground and lay helpless, at which point Tucker killed him by smashing his skull with a concrete block. Respondent and Tucker disposed of the body, and respondent kept Dickson's car for himself. Respondent was arrested the next day and was charged with capital murder under a Mississippi statute. The jury found him guilty and, following a separate sentencing hearing, sentenced him to death. The Mississippi Supreme Court affirmed, finding that the capital murder verdict and death sentence were sustainable under a Mississippi law making an accomplice equally responsible with the principal offender. After exhausting state postconviction remedies, respondent filed a petition for a writ of habeas corpus in Federal District Court, which denied the writ. The Court of Appeals reversed on the ground that respondent's death sentence was invalid under the intervening decision in *Enmund* v. *Florida*, 458 U. S. 782, that the Eighth Amendment forbids the imposition of the death penalty on "one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.*, at 797. The court based its conclusion solely upon its reading of the jury instructions at respondent's state trial, reasoning that under those instructions the jury may well have found respondent guilty and sentenced him to death despite concluding that he had neither killed nor intended to kill or without ever coming to any conclusion on those questions. Accordingly, the court granted a writ of habeas corpus and vacated respondent's death sentence but permitted the State, at its option, to impose a life sentence or conduct a new sentencing hearing at which, with the proper findings, a death sentence could be reimposed.

Held:

1. The Court of Appeals was correct in concluding that neither the jury's verdict of guilt nor its imposition of the death sentence necessarily reflected a finding that respondent killed, attempted to kill, or intended to kill. Pp. 383–384.

2. But the Court of Appeals erred in focusing exclusively on the jury and in ordering a new sentencing hearing without inquiring whether the necessary finding of intent had been made by the state trial court or appellate court. The *Enmund* rule need not be enforced by the jury and does not impose *any* particular form of procedure upon the States. At what point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution. Accordingly, when a federal habeas corpus court reviews an *Enmund* claim, its inquiry cannot be limited to an examination of jury instructions. Rather, the court must examine the entire course of the state proceedings in order to determine whether, at some point, the requisite factual finding as to the defendant's culpability has been made. If it has, the finding must be presumed correct by virtue of 28 U. S. C. § 2254(d), and unless the habeas petitioner can bear the burden of overcoming the presumption, the court must hold that the Eighth Amendment as interpreted in *Enmund* is not offended by the death sentence. Pp. 384–388.

3. The Mississippi Supreme Court's finding was insufficient to satisfy *Enmund*, for *Enmund* holds that the Eighth Amendment does more than require that a death-sentenced defendant be legally responsible for a killing as a matter of state law; it requires that he himself have actually killed, attempted to kill, or intended that a killing take place or that lethal force be used. Pp. 389–390.

4. The proper course for a federal court faced with a habeas corpus petition raising an *Enmund* claim when the state courts have failed to make any finding regarding the *Enmund* criteria is to take steps to require the State's own judicial system to make the factual findings in the first instance. Therefore, it is Mississippi, not the federal habeas corpus court, that should first provide respondent with a reliable determination as to whether he killed, attempted to kill, or intended that a killing take place or that lethal force be used. Pp. 390–391.

5. Here, the District Court should be directed to issue the habeas corpus writ vacating respondent's death sentence but to leave to the State the choice of either imposing a sentence of life imprisonment or reimposing the death sentence after obtaining a determination from its own courts of the factual question whether respondent killed, attempted to

kill, intended to kill, or intended that lethal force would be used. P. 392.

743 F. 2d 244, modified and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 392. BRENNAN, J., filed a dissenting opinion, *post*, p. 393. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 394. STEVENS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 407.

Marvin L. White, Jr., Special Assistant Attorney General of Mississippi, argued the cause for petitioners. With him on the brief were *Edwin Lloyd Pittman*, Attorney General, *Amy D. Whitten*, Special Assistant Attorney General, and *William S. Boyd III*.

Joseph T. McLaughlin argued the cause for respondent. With him on the briefs were *Henry Weisburg* and *Daniel Levin*.*

JUSTICE WHITE delivered the opinion of the Court.

In *Enmund* v. *Florida*, 458 U. S. 782 (1982), we ruled that the Eighth Amendment forbids the imposition of the death penalty on "one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.*, at 797. This case requires us to determine in whose hands the decision that a defendant possesses the requisite degree of culpability properly lies.

**Michael J. Bowers*, Attorney General of Georgia, *Marion O. Gordon*, First Assistant Attorney General, *William B. Hill, Jr.*, Senior Assistant Attorney General, *Mary Beth Westmoreland*, Assistant Attorney General, *Jim Smith*, Attorney General of Florida, *Linley E. Pearson*, Attorney General of Indiana, and *Archie G. McClintock*, Attorney General of Wyoming, filed a brief for the State of Georgia et al. as *amici curiae* urging reversal.

Robert Glass and *Timothy K. Ford* filed a brief for the National Association of Criminal Lawyers as *amicus curiae*.

I

Early in the morning of September 22, 1978, respondent Crawford Bullock and his friend Ricky Tucker accepted Mark Dickson's offer of a ride home from a bar in Jackson, Mississippi. During the course of the ride, Tucker and Dickson began to argue about some money Dickson supposedly owed Tucker. The argument became a fight: Dickson stopped the car, and Dickson and Tucker exchanged blows. Bullock attempted to grab Dickson, but Dickson eluded his grasp and fled from the car. Tucker gave chase and succeeded in tackling Dickson, while Bullock, who had a cast on his leg, followed more slowly. When Bullock caught up with the struggling men, he held Dickson's head as Tucker struck Dickson in the face with a whiskey bottle. Tucker then pummeled Dickson with his fists until Dickson fell to the ground. As Dickson lay helpless, Tucker killed him by smashing his skull with repeated blows from a concrete block. Bullock and Tucker together disposed of Dickson's body, and Bullock kept Dickson's car for himself. Bullock was arrested the next day when police spotted him driving the car. Under questioning at the police station, he confessed to his participation in the course of events just described.

Bullock was charged with capital murder under a Mississippi statute that provided that "[t]he killing of a human being without the authority of law by any means or in any manner shall be capital murder . . . [w]hen done with or without any design to effect death, by any person engaged in the commission of the crime of . . . robbery . . . or in any attempt to commit such." Miss. Code Ann. § 97–3–19(2)(e) (Supp. 1985). Under Mississippi law, a participant in a robbery could be convicted of capital murder under the statute for a murder committed in the course of the robbery by an accomplice notwithstanding the defendant's own lack of intent that any killing take place, for "[i]t is . . . familiar law that when two or more persons act in concert, with a common design, in committing a crime of violence upon others, and a

homicide committed by one of them is incident to the execution of the common design, both are criminally liable for the homicide." *Price* v. *State*, 362 So. 2d 204, 205 (Miss. 1978). In accordance with this doctrine of accomplice liability, the court instructed the jury at the conclusion of the guilt phase of Bullock's trial as follows:

> "The Court instructs the Jury that if you believe from the evidence in this case, beyond a reasonable doubt that on September 21, 1978, in the First Judicial District of Hinds County, Mississippi, Crawford Bullock, Jr., was present, consented to, and encouraged the commission of a crime and thereby *aided* another individual, and that he, the said Crawford Bullock, Jr., or the other, then and there did wilfully, unlawfully and feloniously take and carry away the personal property of another from the presence of Mark Dickson, and from his person, against his will, by violence to his person, to-wit *[sic]*; his billfold or one 1978 Thunderbird automobile then in his possession, then and in that event, the Defendant, Crawford Bullock, Jr. is guilty of robbery as if he had with his own hands committed the whole offense; and, if the Jury further finds from the evidence in this case, beyond a reasonable doubt, that on said date aforesaid, while engaged in the commission of the aforesaid robbery, if any, that the said Crawford Bullock, Jr., did alone, or while acting in consert *[sic]* with another, while present at said time and place by consenting to the killing of the said, Mark Dickson, and that the said Crawford Bullock, Jr., did any overt act which was immediately connected with or leading to its commission, without authority of law, and not in necessary self defense, by any means, in any manner, whether done with or without any design to effect the death of the said Mark Dickson, that the[n], and in that event, the said Crawford Bullock, Jr., is guilty of capital murder." App. 87–89.

The jury found Bullock guilty of capital murder. Following a separate sentencing hearing, the jury found that two statutory aggravating circumstances were present and that they were not outweighed by any mitigating circumstances. Accordingly, the jury sentenced Bullock to death.

On appeal to the Mississippi Supreme Court, Bullock argued, *inter alia*, that the evidence was insufficient as a matter of law to allow submission of the capital murder charge to the jury and that the imposition of the death penalty on him would be so disproportionate to his level of involvement in the crime as to violate the Eighth Amendment. The court rejected both contentions. *Bullock* v. *State*, 391 So. 2d 601 (1980), cert. denied, 452 U. S. 931 (1981). The court ruled that the verdict of capital murder was sustainable in view of the "overwhelming" evidence "that [Bullock] was present, aiding and assisting in the assault upon, and slaying of, Dickson . . . and in the taking of the T-bird automobile, which was in the lawful possession and use of Dickson." 391 So. 2d, at 606. With respect to Bullock's claim that the punishment of death was disproportionate to his degree of culpability, the court noted that "[t]he law is well settled in this state that any person who is present, aiding and abetting another in the commission of a crime, is equally guilty with the principal offender." Because Bullock was "an active participant in the assault and homicide committed upon Mark Dickson," the court concluded that the punishment was not disproportionate to his guilt. *Id.*, at 614.

After exhausting state postconviction remedies, Bullock filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Mississippi. The District Court denied the writ, but the Court of Appeals for the Fifth Circuit reversed on the ground that Bullock's death sentence was invalid under our decision in *Enmund*, which was handed down during the pendency of the District Court proceedings. *Bullock* v. *Lucas*, 743 F. 2d 244 (1984). The

court based this conclusion solely upon its reading of the jury instructions given at Bullock's trial. The court reasoned that under the instructions offered at the guilt phase and quoted in pertinent part above, the jury could have found Bullock guilty of capital murder solely on the basis of his participation in a robbery in which he had aided and abetted someone else who had killed: the instructions did not require a finding of any intent to kill on Bullock's part, nor did they require the jury to find that Bullock had actually killed. In addition, the court noted that the instructions offered the jury at the sentencing phase nowhere required the jury to make any further findings regarding Bullock's personal involvement in the killing. Thus, it was quite possible that the jury had sentenced Bullock to death without ever finding that he had killed, attempted to kill, or intended to kill. In the court's view, *Enmund* prohibited execution of a defendant absent such findings by the trier of fact; accordingly, the court granted a writ of habeas corpus vacating Bullock's death sentence, but permitting the State, "at its option, to either impose a sentence of life imprisonment or, within a reasonable period of time, conduct a new sentencing hearing" at which with the proper findings a death sentence could be reimposed. 743 F. 2d, at 248.

Because the Fifth Circuit's holding that *Enmund* can be satisfied only by findings made at the guilt-innocence or sentencing phase of a trial (see also *Reddix* v. *Thigpen*, 728 F. 2d 705 (CA5 1984)) conflicts with the interpretation of *Enmund* adopted by the Eleventh Circuit, see *Ross* v. *Kemp*, 756 F. 2d 1483 (1985),[1] we granted certiorari, 471 U. S. 1052 (1985).

[1] Under the interpretation of *Enmund* adopted by the Eleventh Circuit in *Ross*, a jury finding that the defendant possesses the requisite culpability is not required by the Eighth Amendment. 756 F. 2d, at 1488. In the absence of such a finding, *Ross* holds, the Eighth Amendment requires no more than that a federal habeas corpus court conduct an independent review of the record to determine whether the defendant's "level of individual participation . . . justifies the application of the death penalty." *Id.*, at 1489. We agree that if the federal court made the *Enmund* finding, the

II

The Court of Appeals was correct in concluding that neither the jury's verdict of guilt nor its imposition of the death sentence necessarily reflects a finding that Bullock killed, attempted to kill, or intended to kill. The jury instructions at the guilt phase were, to say the least, confusing, and they do not lend themselves easily to any particular interpretation. A fair-minded juror, however, could have understood them to mean that the jury could find Bullock guilty of capital murder without regard to his intent and solely by virtue of his having aided his accomplice at some point in the assault that led to the killing.[2] This interpretation of the instructions is but-

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Eighth Amendment would be satisfied, but as will appear, we hold that the state courts should be given the opportunity to address the matter in the first instance.

[2] An instruction offered after the one quoted *supra*, at 380, informed the jury that to find Bullock guilty of capital murder, it must find that he "did in fact kill Mark Dickson without malice, without authority of law, and not in necessary self defense." App. 90–91. This instruction does not change our view that the jury's verdict does not necessarily reflect a finding that Bullock killed. The preceding instruction had explicitly informed the jury that it could find Bullock guilty if his accomplice had done the actual killing. The jury could well have concluded, reading the instructions together, that the instruction that Bullock must have "in fact killed" referred only to a requirement that Bullock have committed acts that rendered him legally accountable for the killing under the previous instruction. Under this reading of the instructions, the earlier, more specific instruction would be read as defining the legal meaning of the requirement that Bullock must have "in fact killed."

Even if the second instruction is read as simply irreconcilable with the first, however, we cannot conclude that the jury followed the second instruction. As was the case last Term in *Francis* v. *Franklin*, 471 U. S. 307, 322 (1985), "[n]othing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." Moreover, to the extent that one can speculate as to which of the

tressed, as Judge Garwood pointed out in his concurring opinion below, by the fact that "the entire case was essentially tried on the theory, in full accordance with the then law of Mississippi, that it was not necessary, either for the felony murder conviction or for the sentence to death, to find that Bullock had either the intent to kill or any personal participation in the killing." 743 F. 2d, at 248. Thus, the jury may well have sentenced Bullock to death despite concluding that he had neither killed nor intended to kill; or it may have reached its decision without ever coming to any conclusion whatever on those questions.

III

But the conclusion that the jury may not have found that the defendant killed, attempted to kill, or intended that a killing take place or that lethal force be employed does not end the inquiry into whether *Enmund* bars the death sentence; rather, it is only the first step. In focusing only on the jury instructions—and in requiring a new sentencing hearing before a jury before the death penalty might be reimposed—the Fifth Circuit apparently proceeded upon the premise that *Enmund* can be satisfied only at a sentencing hearing and by a jury's decision (presumably based upon proof beyond reasonable doubt) that the defendant possessed the requisite culpability. Examination of the nature of our ruling in *Enmund* reveals that this premise is erroneous.

A defendant charged with a serious crime has the right to have a jury determine his guilt or innocence, *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). Findings

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instructions the jurors followed in this case, it seems more likely that they would have chosen the earlier instruction, which, though somewhat harder to follow, appears to be more comprehensive and more specifically tied to the facts presented to the jury.

made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime. See *Connecticut* v. *Johnson*, 460 U. S. 73, 95, and n. 3 (1983) (POWELL, J., dissenting); cf. *Beck* v. *Alabama*, 447 U. S. 625, 645 (1980); *Presnell* v. *Georgia*, 439 U. S. 14 (1978); *id.*, at 22 (POWELL, J., dissenting). But our ruling in *Enmund* does not concern the guilt or innocence of the defendant—it establishes no new elements of the crime of murder that must be found by the jury. Rather, as the Fifth Circuit itself has recognized, *Enmund* "does not affect the state's definition of any substantive offense, even a capital offense." *Reddix* v. *Thigpen*, 728 F. 2d, at 709; see also *Enmund*, 458 U. S., at 810, n. 19 (O'CONNOR, J., dissenting). *Enmund* holds only that the principles of proportionality embodied in the Eighth Amendment bar imposition of the death penalty upon a class of persons who may nonetheless be guilty of the crime of capital murder as defined by state law: that is, the class of murderers who did not themselves kill, attempt to kill, or intend to kill.[3]

The decision whether a particular punishment—even the death penalty—is appropriate in any given case is not one that we have ever required to be made by a jury. Indeed, in *Spaziano* v. *Florida*, 468 U. S. 447 (1984), we specifically rejected the argument that the Sixth Amendment or any other constitutional provision provides a defendant with the right

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[3] We are unable to understand JUSTICE BLACKMUN's statement that we have failed to grasp "the distinction . . . between defining an offense and being entitled to execute a defendant." *Post*, at 403. As stated in the text, we recognize that there is a class of persons whom the State may define as having committed capital murder but whom the State may not permissibly execute. The point we are making, however, is that while the Eighth Amendment prohibits the execution of such defendants, it does not supply a new element of the crime of capital murder that must be found by the jury; hence, such cases as *Cole* v. *Arkansas*, 333 U. S. 196 (1948), which hold that the inadequacy of a jury's findings on the issue of guilt or innocence may not be corrected by an appellate court, are inapposite.

to have a jury consider the appropriateness of a capital sentence. Moreover, the decision whether a sentence is so disproportionate as to violate the Eighth Amendment in any particular case, like other questions bearing on whether a criminal defendant's constitutional rights have been violated, has long been viewed as one that a trial judge or an appellate court is fully competent to make. See, *e. g.*, *Solem* v. *Helm*, 463 U. S. 277 (1983); *Weems* v. *United States*, 217 U. S. 349 (1910).

The determination whether the death sentence is permissible under *Enmund* is different in a significant respect both from the general exercise of sentencing discretion and from the type of Eighth Amendment proportionality inquiry undertaken in *Solem* v. *Helm*. The latter two determinations typically involve case-by-case, totality-of-the-circumstances decisionmaking. *Enmund*, by contrast, imposes a categorical rule: a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death. Nonetheless, the rule remains a substantive limitation on sentencing, and like other such limits it need not be enforced by the jury.

Indeed, *Enmund* does not impose *any* particular form of procedure upon the States. The Eighth Amendment is satisfied so long as the death penalty is not imposed upon a person ineligible under *Enmund* for such punishment. If a person sentenced to death in fact killed, attempted to kill, or intended to kill, the Eighth Amendment itself is not violated by his or her execution regardless of who makes the determination of the requisite culpability; by the same token, if a person sentenced to death lacks the requisite culpability, the Eighth Amendment violation can be adequately remedied by any court that has the power to find the facts and vacate the sentence. At what precise point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution. The State has considerable freedom to structure its capital sentencing

system as it sees fit, for "[a]s the Court has several times made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme." *Spaziano*, *supra*, at 464; see also *Pulley* v. *Harris*, 465 U. S. 37 (1984); *Zant* v. *Stephens*, 462 U. S. 862 (1983); *Gregg* v. *Georgia*, 428 U. S. 153, 195 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.).

Accordingly, when a federal habeas court reviews a claim that the death penalty has been imposed on one who has neither killed, attempted to kill, nor intended that a killing take place or lethal force be used, the court's inquiry cannot be limited to an examination of jury instructions. Rather, the court must examine the entire course of the state-court proceedings against the defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpability has been made.[4] If

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[4]JUSTICE BLACKMUN's reliance on *Hicks* v. *Oklahoma*, 447 U. S. 343 (1980), and *Presnell* v. *Georgia*, 439 U. S. 14 (1978), for the proposition that state appellate courts may not supply essential findings that the jury has omitted is, as applied in this case, misguided. In *Hicks*, we held only that where state law creates for the defendant a liberty interest in having the jury make particular findings, the Due Process Clause implies that appellate findings do not suffice to protect that entitlement. Unlike the defendant in *Hicks*, Bullock had no state-law entitlement at the time of his trial to have the jury (or, indeed, anyone at all) make the *Enmund* findings. Of course, federal law, as later established by *Enmund*, does entitle Bullock to a determination whether he killed, attempted to kill, intended to kill, or intended that lethal force be used; but, for the reasons explained in the text, the federal-law entitlement, unlike the state-law entitlement involved in *Hicks*, does not specify who must make the findings.

In *Presnell*, the defendant was convicted on charges of murder and kidnaping with bodily injury, and was sentenced to death by the jury. The sole aggravating factor supporting the death penalty for murder was that the defendant was also guilty of kidnaping with bodily injury. The Georgia Supreme Court found that the jury had been wrongly instructed on the elements of kidnaping with bodily injury, but affirmed both the conviction for that crime and the use of the crime as an aggravating factor on the ground that the evidence was sufficient to support the jury's findings under a theory on which the jury had not been instructed. We set aside both the

it has, the finding must be presumed correct by virtue of 28 U. S. C. § 2254(d), see *Sumner* v. *Mata*, 449 U. S. 539 (1981), and unless the habeas petitioner can bear the heavy burden of overcoming the presumption, the court is obliged to hold that the Eighth Amendment as interpreted in *Enmund* is not offended by the death sentence.[5]

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conviction and the death sentence on the authority of *Cole* v. *Arkansas*, 333 U. S. 196 (1948), which held that it was constitutional error for a state court to affirm a conviction for one offense on the basis of evidence in the record indicating that the defendant had committed another offense on which the jury had not been instructed. Insofar as it merely applied *Cole* in setting aside the defendant's conviction for kidnaping with bodily injury, *Presnell* is unremarkable and has little to do with this case. See n. 3, *supra*. But in reversing as well the death sentence on the ground that the Georgia Supreme Court could not find an aggravating factor on a theory on which the jury had not been instructed, the *Presnell* Court appeared to assume that the jury's constitutional role in determining sentence was equivalent to its role in determining guilt or innocence. This assumption, of course, is no longer tenable in light of our holding in *Spaziano* v. *Florida*, 468 U. S. 447 (1984).

[5] *Sumner*, of course, establishes that the presumption applies to facts found by appellate as well as trial courts. 449 U. S., at 545–547. There might be instances, however, in which the presumption would not apply to appellate factfinding regarding the *Enmund* criteria because appellate factfinding procedures were not "adequate," see 28 U. S. C. § 2254(d)(2). For example, the question whether the defendant killed, attempted to kill, or intended to kill might in a given case turn on credibility determinations that could not be accurately made by an appellate court on the basis of a paper record, cf. *Anderson* v. *Bessemer City*, 470 U. S. 564, 575 (1985); *Wainwright* v. *Witt*, 469 U. S. 412, 429 (1985). The possibility that such cases falling within the § 2254(d)(2) exception may exist, however, does not excuse the habeas court of its obligation to examine the entire state process to determine whether the *Enmund* findings have been made, for it is by no means apparent that appellate factfinding will always be inadequate. For example, in some cases it may be possible to determine the *Enmund* issue adversely to the defendant even if credibility issues and other ambiguities in the record are resolved in his or her favor. See, *e. g.*, *Ross* v. *Kemp*, 756 F. 2d 1483, 1488–1490 (CA11 1985). We shall not now attempt to determine what factfinding procedures would be adequate in the particular case before us, for, as we shall see, the state courts have not yet purported

IV

The Court of Appeals thus erred in focusing exclusively on the jury and in ordering a new sentencing hearing without inquiring whether the necessary finding of intent had been made by the trial court or by the state appellate court. The State argues that the Mississippi Supreme Court itself made a finding sufficient to satisfy *Enmund* in the course of its direct review of Bullock's conviction and sentence. It relies on two separate statements in the court's opinion. First, in responding to the claim of insufficient evidence, the court said that "[t]he evidence is overwhelming that appellant was present, aiding and assisting in the assault upon, and slaying of, Dickson." 391 So. 2d, at 606. Second, in determining that the death penalty was not disproportionate to the sentences imposed in other cases, the court stated that "[t]he evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon Mark Dickson." *Id.*, at 614.

We are very doubtful, however, that these assessments of the record were sufficient in themselves to constitute a finding that Bullock killed, attempted to kill, or intended to kill Dickson. The Mississippi Supreme Court obviously was not addressing the specific requirements set forth in *Enmund*, for that case had not yet been decided. Rather, the court's remarks are better read as stating the court's conclusion that Bullock's participation in the assault and robbery were sufficient to make him liable for the murder and deserving of the death penalty in light of Mississippi law under which one who takes some overt act in aid of an assault that leads to a killing by his accomplice is equally responsible with the accomplice for the killing. Indeed, immediately before its statement with respect to proportionality, the court said that "[t]he law is well settled in this state that any person who is present,

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to engage in the requisite factfinding, and we decline to decide the hypothetical question of the adequacy of that which has not yet occurred.

aiding and abetting another in the commission of a crime, is equally guilty with the principal offender." 391 So. 2d, at 614. In other words, the Mississippi court's statements represent at most a finding that, as the District Court put it, Bullock "*by legal definition* actually killed." App. to Pet. for Cert. A30–A31 (emphasis added). Such a finding does not satisfy *Enmund*, for *Enmund* holds that the Eighth Amendment does more than require that a death-sentenced defendant be legally responsible for a killing as a matter of state law; it requires that he himself have actually killed, attempted to kill, or intended that lethal force be used.

V

There remains the question of the appropriate course of action for a federal court faced with a petition for habeas corpus raising an *Enmund* claim when the state courts have failed to make any finding regarding the *Enmund* criteria. Two possibilities come immediately to mind. The federal court could itself make the factual determination whether the defendant killed, attempted to kill, or intended to kill, and either grant or deny the writ depending on the outcome of that inquiry. Alternatively, the federal court could take steps to require the State's own judicial system to make the factual findings in the first instance. Such findings would, of course, be presumptively correct as a result of 28 U. S. C. § 2254(d) in any subsequent federal habeas proceedings.

Either alternative would, in theory, be adequate to remedy any hypothesized Eighth Amendment violation, for either approach would prevent the execution of any defendant who did not in fact kill, attempt to kill, or intend the use of lethal force. We believe, however, that the second course of action is the sounder one. Two considerations underlie this conclusion. First, to the extent that *Enmund* recognizes that a defendant has a right not to face the death penalty absent a particular factual predicate, it also implies that the State's judicial process leading to the imposition of the death penalty

must at *some* point provide for a finding of that factual predicate. Accordingly, Bullock "is entitled to a determination [of the issue] in the state courts in accordance with valid state procedures." *Jackson* v. *Denno*, 378 U. S. 368, 393 (1964). Second, the State itself has "a weighty interest in having valid federal constitutional criteria applied in the administration of its criminal law by its own courts." *Rogers* v. *Richmond*, 365 U. S. 534, 548 (1961). Considerations of federalism and comity counsel respect for the ability of state courts to carry out their role as the primary protectors of the rights of criminal defendants, see *Younger* v. *Harris*, 401 U. S. 37 (1971); these same considerations indicate the appropriateness of allowing the Mississippi courts an opportunity to carry out in the first instance the factual inquiry called for by *Enmund*. To paraphrase our opinion in *Jackson* v. *Denno*, *supra*, at 393–394, it is Mississippi, therefore, not the federal habeas corpus court, which should first provide Bullock with that which he has not yet had and to which he is constitutionally entitled—a reliable determination as to whether he is subject to the death penalty as one who has killed, attempted to kill, or intended that a killing take place or that lethal force be used.[6]

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[6] There may be some cases in which the jury instructions would theoretically have permitted the jury to find the defendant guilty of a capital offense and sentence him to death without finding the *Enmund* factors, but in which the theory on which the case was tried and the evidence received leave no doubt that the jury's verdict rested on a finding that the defendant killed or intended to kill. For example, where a defendant conceded that he committed the killing and defended against the charge of murder only by claiming self-defense, a jury verdict of guilty would necessarily satisfy *Enmund* even if, for some reason, the trial court's instructions did not explicitly require a finding that the defendant killed, attempted to kill, or intended to kill. In such a case, a federal habeas court would be justified in treating the state courts' failure to make explicit *Enmund* findings as harmless beyond a reasonable doubt; the court would therefore simply deny the writ without requiring further proceedings in the state courts. Cf. *Ross* v. *Kemp*, 756 F. 2d, at 1499–1500 (Clark, J., concurring in part and dissenting in part).

VI

The proceeding that the state courts must provide Bullock need not take the form of a new sentencing hearing before a jury. As indicated above, the Eighth Amendment does not require that a jury make the findings required by *Enmund*. Moreover, the sentence currently in force may stand provided only that the requisite findings are made in an adequate proceeding before some appropriate tribunal—be it an appellate court, a trial judge, or a jury.[7] A new hearing devoted to the identification and weighing of aggravating and mitigating factors is thus, as far as we are concerned, unnecessary.

Accordingly, the District Court should be directed to issue the writ of habeas corpus vacating Bullock's death sentence but leaving to the State of Mississippi the choice of either imposing a sentence of life imprisonment or, within a reasonable time, obtaining a determination from its own courts of the factual question whether Bullock killed, attempted to kill, intended to kill, or intended that lethal force would be used. If it is determined that Bullock possessed the requisite culpability, the death sentence may be reimposed. The judgment of the Court of Appeals is modified to this extent, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE BURGER, concurring.

Although I see no need for remanding for further findings in the State's courts, I join the Court's opinion. It is true that the Mississippi Supreme Court did not have *Enmund*'s

[7] Mississippi has adopted a post-*Enmund* capital sentencing statute, under which the task of determining whether the defendant killed, attempted to kill, intended to kill, or intended that lethal force be used is delegated to the jury, Miss. Code Ann. § 99–19–101(7) (Supp. 1985). Whether this provision has any application where, as in this case, trial occurred prior to the passage of the statute, is a matter of state law that we do not attempt to resolve.

findings explicitly in mind when it reviewed the sentence of death imposed on respondent Bullock, because the Mississippi courts had completed their review before *Enmund* was decided. Nevertheless, the Mississippi Supreme Court's opinion makes it clear that *Enmund*'s concerns have been fully satisfied in this case.

In rejecting respondent's claim that there was insufficient evidence to support his capital murder conviction because he "was an unwilling participant in the robbery-homicide," that court explicitly found "[t]he evidence is overwhelming that appellant was present, *aiding and assisting in the assault upon, and slaying of,* Dickson." *Bullock* v. *State*, 391 So. 2d 601, 606 (1980) (emphasis added), cert. denied, 452 U. S. 931 (1981). That court further rejected a claim that the death penalty was disproportionate to sentences imposed in similar cases, after again finding that "[t]he evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon Mark Dickson." 391 So. 2d, at 614.

Surely these statements reflect a conclusion of the state court that respondent actively participated in the actual killing, which is far more than *Enmund* requires. In these circumstances, I see no need to expend finite judicial resources by remanding and calling for the Mississippi Supreme Court to tell us what it has already made clear, *i. e.*, that respondent's culpability more than satisfies any proportionality concerns dictated by *Enmund*.

JUSTICE BRENNAN, dissenting.

Although I join JUSTICE BLACKMUN's and JUSTICE STEVENS' dissents, I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting). Accordingly, I would vacate the death sentence and remand the case so that the state court can determine what sentence—other than death—may be appropriate.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Last Term, in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) (a case not even cited by the Court in its controlling opinion, *ante*, p. 376), we recognized institutional limits on an appellate court's ability to determine whether a defendant should be sentenced to death:

> "Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed '[those] compassionate or mitigating factors stemming from the diverse frailties of humankind.' When we held that a defendant has a constitutional right to the consideration of such factors, we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses." 472 U. S., at 330–331 (citations omitted; interpolation in original).

That statement in *Caldwell* is not an abstract disquisition on appellate courts generally. It concerns, in particular, the institutional limits of the Supreme Court of Mississippi in capital cases. Today, the Court ignores those recently stated limits and holds that the Mississippi Supreme Court may be competent to make, on a paper record, the findings required by *Enmund* v. *Florida*, 458 U. S. 782 (1982)—that Crawford Bullock, Jr., killed, attempted to kill, or intended to kill Mark Dickson, and thus deserves to die. The Court reaches that result by paying lipservice to the constitutional significance of *Enmund* while relegating *Enmund* findings to a position of judicial afterthought. The nature of the *Enmund* findings, however, dictates who must make them and at what point in the sentencing process they must be

made. The Eighth Amendment requires that *Enmund* findings be made at the trial court level before the sentencer condemns a defendant to death. The Court's misreading of *Enmund* threatens a retreat from the constitutional safeguards on the capital sentencing process that the Court has acknowledged in the decade since *Gregg* v. *Georgia*, 428 U. S. 153 (1976).

I

Bullock testified both at his trial and at his sentencing proceeding. He explicitly denied that he killed, attempted to kill, or intended to kill Dickson. See, *e. g.*, Tr. 956, 983, 996, 1190. The jury's verdict and sentence are entirely consistent under Mississippi law with Bullock's testimony. As the Court recognizes, that law and the trial court's instructions permitted the jury to convict him and to sentence him to death without finding any particular degree of personal participation in the killing. *Ante*, at 383–384.

The Court also recognizes that the Mississippi Supreme Court failed to make the required *Enmund* findings. That court affirmed Bullock's conviction and death sentence based on its view of Bullock's culpability under Mississippi's law of aiding and abetting, which establishes a threshold far below *Enmund*'s constitutional minimum. *Ante*, at 389–390. The Mississippi Supreme Court explicitly based its account of the crime on Bullock's written confession, see *Bullock* v. *State*, 391 So. 2d 601, 605, cert. denied, 452 U. S. 931 (1981), in which Bullock stated only that Tucker killed Dickson, and that he, Bullock, had no intention of robbing Dickson. Tr. 387–390. That confession provides no evidence that Bullock killed, attempted to kill, or intended to kill Dickson. Thus, the Court properly concludes that none of the required *Enmund* findings has been made.

II

The central message of *Enmund* is that the death penalty cannot constitutionally be imposed without an intensely indi-

vidual appraisal of the "personal responsibility and moral guilt" of the defendant. 458 U. S., at 801.

> "The focus must be on *his* culpability, . . . for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (footnote omitted), which means that we must focus on 'relevant facets of the character and record of the individual offender.' *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976)." *Id.*, at 798 (emphasis in original).

See also *Eddings* v. *Oklahoma*, 455 U. S. 104, 110–112 (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 603–604 (1978) (plurality opinion); *Gregg* v. *Georgia*, 428 U. S., at 199 (joint opinion).

Put simply, *Enmund* establishes a constitutionally required factual predicate for the valid imposition of the death penalty. Cf. *ante*, at 390. Like the statutory aggravating circumstances discussed in *Zant* v. *Stephens*, 462 U. S. 862 (1983), the *Enmund* findings "circumscribe the class of persons eligible for the death penalty." 462 U. S., at 878. Just as, absent the finding of a statutory aggravating circumstance, "'[a] case may not pass . . . into that area in which the death penalty is authorized'" under Georgia law, *id.*, at 872, quoting *Zant* v. *Stephens*, 250 Ga. 97, 100, 297 S. E. 2d 1, 4 (1982), so too, absent a finding of one of the *Enmund* factors, a case may not pass into that area in which the death penalty is authorized by the Eighth Amendment.

The Court agrees that it would be wrong for Mississippi to execute Bullock without first determining that he killed, attempted to kill, or intended to kill Dickson. See, *e. g.*, *ante*, at 378, 385, 386. But if that is so, then it was also wrong for the Mississippi jury to discharge "the truly awesome responsibility of decreeing death for a fellow human," *McGautha* v. *California*, 402 U. S. 183, 208 (1971), without first considering the fundamental issue of his personal culpability. By condemning Bullock to die, the jury announced

that he was not fit to live. This expression of the community's ultimate outrage, unaccompanied as it was by any finding that Bullock possessed the degree of culpability required by *Enmund*, involved the kind of deprivation of human dignity which the Eighth Amendment forbids. Cf., *e. g.*, *Trop* v. *Dulles*, 356 U. S. 86, 100–102 (1958) (plurality opinion); *Weems* v. *United States*, 217 U. S. 349, 366 (1910).

A

The question of how to cure this constitutional violation remains. The Court holds that an adequate remedy for the absence of *Enmund* findings can be supplied by "any court that has the power to find the facts and vacate the sentence." *Ante*, at 386. I believe that, in this case, only a new sentencing proceeding before a jury can guarantee the reliability which the Constitution demands. But the Court's decision today goes beyond a simple determination of how to cure an error that has already occurred. It tells the States, in effect, that it is no error for a jury or a trial judge to say that a defendant should die without first considering his personal responsibility and moral guilt, as *Enmund* requires. By turning the jury or trial court's determination into what can be viewed only as a preliminary stage in the capital-sentencing process, the Court's holding poses the threat of diffusing the sentencer's sense of responsibility in the manner condemned in *Caldwell*. The Court thus ignores both the proper institutional roles of trial and appellate courts and the pragmatic and constitutional concerns with reliability that underlie those roles. In short, the Court's holding rests on an improper equation of the wholly dissimilar functions of finding facts and of vacating a sentence because no facts have been found. *Enmund* established a clear constitutional imperative that a death sentence not be *imposed* by a sentencer who fails to make one of the *Enmund* findings. The Court confuses this imperative with the guarantee it purports to

make today that a death sentence will not be *carried out* before someone makes an *Enmund* finding.

That this ignores a distinction with a constitutional difference is made clear by the Court's decisions in *Cole* v. *Arkansas*, 333 U. S. 196 (1948), and *Presnell* v. *Georgia*, 439 U. S. 14 (1978). In *Cole*, the Court reversed a state appellate decision that had affirmed the defendants' sentences by finding they had violated a different statutory provision from the one with which they had been charged. It recognized that the Due Process Clause requires that defendants "have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." 333 U. S., at 202. In *Presnell*, the Court acknowledged that the "fundamental principles of procedural fairness" announced in *Cole* "apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." 439 U. S., at 16. It thus reversed a death sentence which the Georgia Supreme Court had affirmed on the basis of its own finding that evidence in the record would support a statutory aggravating circumstance that had not been found by the jury. Notably, in neither *Cole* nor *Presnell* did this Court consider whether the State Supreme Courts' evidentiary findings were *correct;* whether their findings were right was entirely irrelevant to the question whether the Due Process Clause gave them the power to make such findings. The Court's decision today gives a state appellate court *carte blanche* to engage in factfinding concerning issues that no one at trial thought to be relevant. Here, as the Court recognizes, "'the entire case was essentially tried on the theory . . . that it was not necessary, either for the felony murder conviction or for the sentence to death, to find that Bullock had either the intent to kill or any personal participation in the killing.'" *Ante*, at 384, quoting *Bullock* v. *Lucas*, 743 F. 2d 244, 248

(CA5 1984) (concurring opinion); see also, *e. g.*, Tr. 1155. The critical issue was never determined in the trial court.[1]

Far more than "[c]onsiderations of federalism and comity," *ante*, at 391, should prevent this Court, and other federal habeas courts, from examining trial transcripts and making *Enmund* findings themselves. Considerations of reliability provide a compelling reason for requiring state trial courts to address this issue in the first instance. And, with respect to the question of reliability, the Mississippi Supreme Court is in no better position than is this Court to determine Bullock's credibility.

The Court's conclusion that we should allow the States to adopt capital punishment schemes that depend on appellate factfinding because "it is by no means apparent that appellate factfinding will *always* be inadequate," *ante*, at 388, n. 5 (emphasis added), turns on its head the heightened concern with reliability that has informed our review of the death penalty over the past decade.[2] See, *e. g.*, *Caldwell* v. *Mississippi*,

[1] The Court's attempt to distinguish *Presnell* on the ground that *Spaziano* v. *Florida*, 468 U. S. 447 (1984), rejected the assumption that juries have equivalent constitutional roles in determining guilt or innocence and in determining capital sentences, see *ante*, at 387–388, n. 4, is misplaced. *Cole* and *Presnell* hold that the Due Process Clause requires that appellate courts review convictions and sentences "as [they] were determined *in the trial court.*" *Cole*, 333 U. S., at 202 (emphasis added). *Spaziano* simply held that the Constitution permits trial judges, rather than trial juries, to make sentencing determinations. See *infra*, at 401, and n. 3.

[2] The Court's reliance on *Sumner* v. *Mata*, 449 U. S. 539 (1981), is misplaced. There, the Court held that the presumption of correctness accorded state-court findings of fact under 28 U. S. C. § 2254(d) extends to appellate findings as well as trial-court findings. 449 U. S., at 545–547. But the presumption of correctness is defeated by a showing that "the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing." 28 U. S. C. § 2254(d)(2). The question whether state procedures are "adequate" involves two distinct inquiries. The first is whether the procedure employed in a particular case in fact afforded the defendant a full and fair hearing. The second is whether the procedure itself comports with due process. Bullock raises both those

472 U. S., at 328–329; *California* v. *Ramos*, 463 U. S. 992, 998–999 (1983); *Beck* v. *Alabama*, 447 U. S. 625, 637–638 (1980); *Lockett* v. *Ohio*, 438 U. S., at 604 (plurality opinion); *Gardner* v. *Florida*, 430 U. S. 349, 358–359 (1977) (opinion announcing judgment); *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion). I believe that the Eighth Amendment not only requires that the sentencer make *Enmund* findings before it decides that a defendant must die, but also requires that the *Enmund* factfinder be present at the trial, to see and hear the witnesses.

The Court long has recognized the special competence of trial courts which formed the basis for *Caldwell*'s discussion of the "institutional limits on what an appellate court can do." 472 U. S., at 330. In a variety of contexts, the Court has relied upon the New York Court of Appeals' explanation

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questions: he claims that in his case the Mississippi Supreme Court failed to use adequate procedures for making *Enmund* findings, and that a procedure which places the responsibility for making *Enmund* findings on the Mississippi Supreme Court is inherently inadequate. *Sumner* v. *Mata* does nothing to answer the latter question, because it assumes that the appellate court is constitutionally a proper factfinder. In *Mata*, this Court explicitly acknowledged that the trial-court record on which the California Court of Appeal based its findings concerning the suggestiveness of a photographic lineup was "completely adequate" for that purpose. 449 U. S., at 543. *Sumner* v. *Mata* therefore says nothing about how state-court findings are to be treated when the record on which they are based, by its very nature, is inadequate to permit factfinding in the first instance.

Moreover, the opinion in *Mata* does not concern itself with explaining when an appellate court is constitutionally incompetent to find facts. That an appellate court is not always a proper factfinder is clear beyond doubt. Surely, the Court would not read *Sumner* v. *Mata* to foreclose habeas relief in cases where an essential element of the offense was not found at trial. Cf. *ante*, at 384. In § 2254(d)(2)'s terms, a "factfinding procedure" that vested in appellate courts the responsibility for determining an element of the offense would not be constitutionally "adequate." Similarly, I believe, the *Enmund* findings concern the kind of facts that can be found only by someone who has actually seen and heard the witnesses when they testified.

in *Boyd* v. *Boyd*, 252 N. Y. 422, 429, 169 N. E. 632, 634 (1930):

> "Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal. . . . His was the opportunity, the responsibility and the power to decide."

See, *e. g.*, *Wainwright* v. *Witt*, 469 U. S. 412, 434 (1985) (quoting *Boyd*); *Marshall* v. *Lonberger*, 459 U. S. 422, 434 (1983) (same).

Our precedents are not to the contrary. Although we held in *Spaziano* v. *Florida*, 468 U. S. 447 (1984), that neither the Sixth nor the Eighth Amendment required jury sentencing in capital cases, we made that determination in the face of a Florida statute which "plac[ed] responsibility on the *trial* judge to impose the sentence in a capital case." *Id.*, at 465 (emphasis added). In the relevant respects, a trial judge in a capital case is more like a jury than he is like an appellate court. Like the jury, he has seen the witnesses, and is well positioned to make those "determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Wainwright* v. *Witt*, 469 U. S., at 428.[3]

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[3] Every State with a death penalty statute has implicitly recognized this essential point, even though not all of them have explicitly held that *Enmund* findings must be made by the trial court. The seven States whose schemes involve judge sentencing all vest the power to impose sentence in a judge who actually has seen the presentation of evidence and confronted the defendant. See Ala. Code § 13A–5–46 (1982); Ariz. Rev. Stat. Ann. § 13–703 (Supp. 1985); Fla. Stat. § 921.141 (1985); Idaho Code § 19–2515 (Supp. 1985); Ind. Code § 35–50–2–9 (Supp. 1985); Mont. Code Ann. § 46–18–301 (1985); Neb. Rev. Stat. §§ 29–2520 and 29–2521

B

The Court's discussion of "the nature of our ruling in *Enmund*," *ante*, at 384, reveals a reliance on three premises: first, *Enmund* "does not impose any particular form of procedure upon the States," *ante*, at 386 (emphasis omitted); second, *Enmund* "'does not affect the state's definition of any substantive offense, even a capital offense,'" *ante*, at 385, quoting *Reddix* v. *Thigpen*, 728 F. 2d 705, 709 (CA5), cert. denied, 469 U. S. 990 (1984); and, third, *Enmund* is a "substantive limitation on sentencing" amenable to traditional proportionality review, *ante*, at 386. None of these propositions justifies the Court's holding today.

That we have refused "'to say that there is any one right way for a State to set up its capital sentencing scheme,'" *ante*, at 387, quoting *Spaziano*, 468 U. S., at 464, does not mean that there are no wrong ways. As has been shown, a capital-sentencing scheme that permits an appellate court to

(1979). No State has placed the sentencing power, as opposed to the power to review sentences, in an appellate court. Every State provides for an evidentiary sentencing hearing, to be conducted in front of the sentencing authority, be it judge or jury.

Enmund identified 17 States in which the then-existing death penalty statutes potentially countenanced the execution of defendants who neither killed, attempted to kill, or intended to kill: Arizona, California, Connecticut, Florida, Georgia, Idaho, Indiana, Mississippi, Montana, Nebraska, Nevada, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, and Wyoming. See 458 U. S., at 789, n. 5; *id.*, at 792, nn. 12 and 13. Since *Enmund*, seven of those States have addressed the issue and apparently have concluded that the sentencer must make *Enmund* findings before imposing sentence. See *State* v. *McDaniel*, 136 Ariz. 188, 199, 665 P. 2d 70, 81 (1983); *People* v. *Garcia*, 36 Cal. 3d 539, 556–557, 684 P. 2d 826, 835–837 (1984), cert. denied, 469 U. S. 1229 (1985); *Allen* v. *State*, 253 Ga. 390, 395, n. 3, 321 S. E. 2d 710, 715, n. 3 (1984), cert. denied, 470 U. S. 1059 (1985); Miss. Code Ann. § 99–19–101(7) (Supp. 1985); *State* v. *Stokes*, 308 N. C. 634, 651–652, 304 S. E. 2d 184, 195 (1983); *Hatch* v. *Oklahoma*, 662 P. 2d 1377, 1382–1383 (Okla. Crim. App. 1983); *State* v. *Peterson*, 287 S. C. 244, 248, 335 S. E. 2d 800, 802 (1985). Five others—Connecticut, Montana, Nebraska, Nevada, and South Dakota—have not yet considered cases raising an *Enmund* claim.

make *Enmund* findings sacrifices reliability needlessly to no discernible end, and cannot satisfy the Eighth Amendment.

That *Enmund* does not restrict the State's power to define offenses is equally beside the point. A State's decision to define a crime as "capital" cannot "automatically . . . dictate what should be the proper penalty," *Lockett* v. *Ohio*, 438 U. S., at 602 (plurality opinion), and does not empower the State to execute a defendant who neither killed, nor attempted to kill, nor intended to kill. In *Coker* v. *Georgia*, 433 U. S. 584 (1977), for example, Georgia's definition of rape as a capital offense did not dispose of the Eighth Amendment issue. Both JUSTICE O'CONNOR's dissent in *Enmund* and the Court of Appeals' opinion in *Reddix*—the authorities upon which the Court relies—recognize the distinction, which seems to elude the Court, between defining an offense and being entitled to execute a defendant. See *Enmund*, 458 U. S., at 810, and n. 19 (O'CONNOR, J., dissenting) (Enmund did not contest his conviction for felony murder; his "sole challenge is to the penalty imposed"); *Reddix*, 728 F. 2d, at 709 (the State may convict a defendant of a capital crime without requiring an instruction on intent; "*Enmund*, however, will 'bar a *death penalty*'" absent such an instruction, quoting *Skillern* v. *Estelle*, 720 F. 2d 839, 847 (CA5 1983) (emphasis in *Skillern*), cert. denied, 469 U. S. 873 (1984)). A State remains free to define felony murder as it wishes; but it can execute a felony murderer who has been sentenced to death only by a sentencer who has determined that he possesses the degree of culpability discussed in *Enmund*.

The Court also would justify its holding by reference to the discussion of Eighth Amendment principles of proportionality in *Solem* v. *Helm*, 463 U. S. 277 (1983). The Court's discussion mistakenly amalgamates review and essentially *de novo* factfinding. Certainly, the Court is correct that "the decision whether a sentence is so disproportionate as to violate the Eighth Amendment in any particular case . . . has long been viewed as one that a trial judge or an appellate

court is fully competent to make." *Ante*, at 386. But the Eighth Amendment demands more than that the reviewing court decide whether the sentencer has properly weighed the seriousness of the offense and the severity of the punishment. The Eighth Amendment binds the sentencer as well. The joint opinions in *Gregg* v. *Georgia*, 428 U. S. 153 (1976), *Proffitt* v. *Florida*, 428 U. S. 242 (1976), and *Jurek* v. *Texas*, 428 U. S. 262 (1976), all explicitly rested their approval of the capital-sentencing schemes before them on the *combination* of channeled factfinding by the sentencer and appellate review. In *Gregg*, an "important additional safeguard" was provided by the Georgia Supreme Court's review of "whether the evidence supports the jury's finding of a statutory aggravating circumstance," as well as by the exercise of comparative proportionality review. 428 U. S., at 198. In *Proffitt*, "meaningful appellate review" was provided because the appellate court had before it written findings justifying the imposition of the death penalty. 428 U. S., at 251. In *Jurek*, the jury had to make specific findings, which were then subject to appellate review. 428 U. S., at 269, 276. To permit States to collapse factfinding and review into one proceeding is to abandon one of the most critical protections afforded by every capital-sentencing scheme to which the Court previously has given its approval.

Enmund "insist[ed] on 'individualized consideration as a constitutional requirement *in imposing the death sentence*,'" 458 U. S., at 798 (emphasis added), quoting *Lockett* v. *Ohio*, 438 U. S., at 605, and not merely in reviewing the sentence imposed. The sentencer is not relieved of the duty to consider whether the severity of the defendant's crime justifies the death penalty by the availability of proportionality review. *Enmund* places a substantive limitation on a process that precedes proportionality review.

C

This case demonstrates graphically why a trial-court sentencer must make the *Enmund* determination. Under

Mississippi law, "the jury is the sole player in the judicial process who may vote to send an accused to die." *Wiley* v. *State*, 449 So. 2d 756, 762 (Miss. 1984); see also *Williams* v. *State*, 445 So. 2d 798, 811 (Miss. 1984), cert. denied, 469 U. S. 1117 (1985). To the extent that *Enmund* places a substantive limitation on sentencing, then, Bullock is entitled to insist that the sentencing jury heed its limits. *Caldwell* suggests that to postpone Bullock's right to an *Enmund* determination is effectively to deprive him of that right because, in Mississippi, capital review is "conducted with a presumption of . . . correctness." *Wiley*, 449 So. 2d, at 762; see *Caldwell*, 472 U. S., at 331; see also Miss. Code Ann. § 99–19–105 (Supp. 1985). The Mississippi Supreme Court examines the record solely to see whether a reasonable jury *could* have concluded that Bullock killed, attempted to kill, or intended to kill, rather than whether Bullock in fact did any of those things. Saying that Bullock might have acted with the requisite culpability does not satisfy the constitutional requirement that Bullock actually have acted with that degree of blameworthiness.

Hicks v. *Oklahoma*, 447 U. S. 343 (1980), makes clear that the former inquiry is simply insufficient to satisfy due process. In *Hicks*, the Court vacated a sentence imposed, as Oklahoma law required, by a jury which had relied upon an invalid statutory provision despite the fact that the Court of Criminal Appeals had affirmed the sentence as within the permissible range. *Hicks* held that when a State vests the sentencing power in the trial jury, a defendant has "a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." *Id.*, at 346. A state appeals court cannot reform a defendant's sentence, thus denying him the right actually to be sentenced by a jury "simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that [affirmed by the appellate court]. Such an arbitrary disregard of the petitioner's right

to liberty is a denial of due process of law." *Ibid.* (emphasis in original).

As for reliability, the Court buries in a footnote an acknowledgment that "the question whether the defendant killed, attempted to kill, or intended to kill might in a given case turn on credibility determinations that could not be accurately made by an appellate court on the basis of a paper record, cf. *Anderson* v. *Bessemer City*, 470 U. S. 564, 575 (1985); *Wainwright* v. *Witt*, 469 U. S. 412, 429 (1985)." *Ante*, at 388, n. 5. The Court fails to notice that this *is* that "given case": Bullock took the stand, at both the guilt and penalty phases of his trial, to deny having killed, having attempted to kill, or having intended to kill Dickson. See Tr. 956, 983, 996, 1190. I have read the trial transcript. Although I think the evidence is consistent with Bullock's claim that the killing of Mark Dickson resulted from a drunken brawl between Tucker and Dickson that tragically got out of hand, cf. *Bullock* v. *Lucas*, 743 F. 2d, at 248 (concurring opinion), I must concede that a jury or judge who saw Bullock testify might well think he lied. I fail, however, to see how an appellate court confidently could conclude, without any indication from anyone who actually saw him testify, that Bullock's account was so unworthy of belief that he was properly condemned to death.

Moreover, nothing in the Court's opinion suggests that this case is at all unusual in this respect.[4] To permit the States

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[4] I assume that many capital defendants who neither killed, attempted to kill, nor intended to kill take the stand, at least at the sentencing hearing, since they know that if they convince the sentencer of their diminished level of personal culpability their lives will be spared. The considerations of federalism and comity identified by the Court are hardly best served by allowing the State to construct capital-sentencing schemes that require federal habeas courts to examine in every case the nature of the evidence presented in order to determine whether the State's regular capital-sentencing procedure is satisfactory. It is far better, it seems to me, to establish a bright-line rule requiring the findings to be made by the trial court, especially since the Court has failed to identify a single reason why a

to construct capital-sentencing schemes that by their very nature will be inadequate in cases such as this strikes me as an abdication of our responsibility under the Eighth Amendment to ensure that the system of capital punishment, as well as the imposition of the penalty on individual defendants, meets the Constitution's requirements.[5]

Here, Bullock had a legitimate expectation that the sentencing jury would consider his personal responsibility and moral guilt before deciding to send him to die. Under *Enmund*, the only way to guarantee that such consideration has been given is to require the sentencer to determine that the defendant either killed, or attempted to kill, or intended to kill. That a jury *might* or *could* have made such a determination hardly provides a guarantee that this jury *did*. Because I believe every defendant is entitled to that guarantee, I would vacate the death sentence and remand the case with instructions to provide Bullock with a sentencing hearing before a jury. Inasmuch as the majority refuses to take this essential step, I dissent.

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, dissenting.

The justification for executing the defendant depends on the degree of his culpability—"what [his] intentions, expecta-

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State legitimately could prefer to vest the factfinding function in an appellate court.

[5] The Court's refusal to "determine what factfinding procedures would be adequate in the particular case before us," *ante*, at 388, n. 5, strikes me as somewhat perverse. Although most of the cases we hear concern broad legal questions the resolution of which will affect many persons other than the actual parties, this should not blind us to the fact that our authority to reach those questions rests on the presence of a concrete case. The question as to what procedures would be adequate in this case is not, as the Court suggests, "hypothetical." *Ibid.* The believability of Bullock's testimony is the critical factor, and the credibility judgment can be made, in the first instance, only by someone who has seen him testify. If anything is "hypothetical," it is the Court's assumption that an appellate factfinding procedure that is clearly inadequate for the actual case before it will be adequate in hypothetical cases not before it.

tions, and actions were. American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability,' *Mullaney* v. *Wilbur*, 421 U. S. 684, 698 (1975), and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing." *Enmund* v. *Florida*, 458 U. S. 782, 800 (1982). The Eighth Amendment therefore precludes the imposition of a death sentence upon a defendant whose "crime did not reflect 'a consciousness materially more "depraved" than that of any person guilty of murder.'" *Id.*, at 800–801.

Because the finding of moral culpability required by *Enmund* is but one part of a judgment that "is ultimately understood only as an expression of the community's outrage—its sense that an individual has lost his moral entitlement to live,"* I believe that the decision whether a death sentence is the only adequate response to the defendant's moral culpability must be made by a single decisionmaker, be it the trial court or the jury. The State of Mississippi has wisely decided that the jury is the decisionmaker that is best able to "express the conscience of the community on the ultimate question of life or death." *Witherspoon* v. *Illinois*, 391 U. S. 510, 519 (1968). As the Court points out, *ante*, at 383–384, a Mississippi jury has not found that respondent Bullock killed, attempted to kill, or intended that a killing take place or that lethal force be used. It follows, in my view, that a Mississippi jury has not determined that a death sentence is the only response that will satisfy the outrage of the community, and that a new sentencing hearing must be conducted if respondent is ultimately to be sentenced to die. In accordance with this reasoning, I would affirm the judgment of the Court of Appeals.

**Spaziano* v. *Florida*, 468 U. S. 447, 467 (1984) (STEVENS, J., concurring in part and dissenting in part).

Syllabus

TRANSCONTINENTAL GAS PIPE LINE CORP. *v.* STATE OIL AND GAS BOARD OF MISSISSIPPI ET AL.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

No. 84–1076. Argued October 8, 1985—Decided January 22, 1986

In 1978, during a period of natural gas shortage, appellant interstate pipeline entered into long-term contracts with appellee Getty Oil Co. and others to purchase natural gas from a common gas pool in Mississippi. The contract with Getty obligated appellant to buy only Getty's shares of the gas produced by the wells Getty operated. Demand was sufficiently high that appellant also purchased, on a noncontract basis, the production shares of smaller owners, such as appellee Coastal Exploration, Inc., in the Getty wells. But in 1982, consumer demand dropped significantly, and appellant began to have difficulty in selling its gas. It therefore announced that it would no longer purchase gas from owners with whom it had not contracted. Getty cut back production so that its wells produced only that amount of gas equal to its ownership interest in the maximum flow. This deprived Coastal of revenue, because none of its share of the common pool gas was being produced. Coastal then filed a petition with appellee Mississippi State Oil and Gas Board (Board), asking it to enforce statewide Rule 48 requiring gas purchasers to purchase gas without discrimination in favor of one producer against another in the same source of supply. The Board found appellant in violation of Rule 48 and ordered it to start taking gas "ratably" (*i.e.*, in proportion to the various owners' shares) from the gas pool, and to purchase the gas under nondiscriminatory price and take-or-pay conditions. On appeal, the Mississippi Circuit Court held that the Board's authority was not pre-empted by the Natural Gas Act of 1938 (NGA) or the Natural Gas Policy Act of 1978 (NGPA), and that the NGPA effectively overruled *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kansas*, 372 U. S. 84, which struck down, on pre-emption grounds, a state regulation virtually identical to the Board's order. The Mississippi Supreme Court affirmed.

Held: The Board's ratable-take order is pre-empted by the NGA and NGPA. Pp. 417–425.

(a) Congress, in enacting the NGPA, did not alter the characteristics of the comprehensive regulatory scheme that provided the basis in *Northern Natural* for the finding of pre-emption. The Board's order directly undermines Congress' determination in enacting the NGPA that the supply, demand, and price of high-cost gas be determined by market

forces. To the extent that Congress in the NGPA denied the Federal Energy Regulatory Commission (FERC) the power to regulate directly the prices at which pipelines purchase high-cost gas, it did so because it wanted to leave determination of supply and first-sale price to the market. In light of Congress' intent to move toward a less regulated national natural gas market, its decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the States to impose additional regulations. Pp. 417–423.

(b) The Board's order disturbs the uniformity of the federal scheme, since interstate pipelines will be forced to comply with varied state regulations of their purchasing practices. The order would also have the effect of increasing the ultimate price to consumers, thus frustrating the federal goal of ensuring low prices most effectively. Pp. 423–425.

457 So. 2d 1298, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, and MARSHALL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which POWELL, STEVENS, and O'CONNOR, JJ., joined, *post*, p. 425.

John Marshall Grower argued the cause for appellant. With him on the briefs were *Jefferson D. Stewart, R. Wilson Montjoy II, R. V. Loftin, Jr.*, and *Thomas E. Skains*.

Jerome M. Feit argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General Lee, William H. Satterfield, Joseph S. Davies*, and *John H. Conway*.

Ed Davis Noble, Jr., Assistant Attorney General of Mississippi, argued the cause for appellee State Oil and Gas Board of Mississippi. With him on the brief were *Edwin Lloyd Pittman*, Attorney General, and *R. Lloyd Arnold*, Assistant Attorney General. *Glenn Gates Taylor* argued the cause for appellee Coastal Exploration, Inc. With him on the brief was *Kenneth I. Franks*. *Walker L. Watters* and *David T. Cobb* filed a brief for appellee Getty Oil Co.*

*Briefs of *amici curiae* urging reversal were filed for the Interstate Natural Gas Association of America by *Harold L. Talisman* and *John H. Cheatham III;* and for Associated Gas Distributors by *Frederic Moring*.

Briefs of *amici curiae* urging affirmance were filed for the State of Texas by *Jim Mattox*, Attorney General, *David R. Richards*, Executive Assist-

JUSTICE BLACKMUN delivered the opinion of the Court.

We are confronted again with the issue of a state regulation requiring an interstate pipeline to purchase gas from all the parties owning interests in a common gas pool. The purchases would be in proportion to the owners' respective interests in the pool, and would be compelled even though the pipeline has pre-existing contracts with less than all of the pool's owners.

This Court, in *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kansas*, 372 U. S. 84 (1963), struck down, on pre-emption grounds, a virtually identical regulation. In the present case, however, the Supreme Court of Mississippi ruled that the subsequently enacted Natural Gas Policy Act of 1978 (NGPA), 92 Stat. 3351, 15 U. S. C. § 3301 *et seq.*, effectively nullified *Northern Natural* by vesting regulatory power in the States over the wellhead sale of gas. The Mississippi Supreme Court went on to hold that the Mississippi regulation did not impermissibly burden interstate commerce. Because of the importance of the issues in the functioning of the interstate market in natural gas, we noted probable jurisdiction. 470 U. S. 1083 (1985).

I

The Harper Sand gas pool lies in Marion County in southern Mississippi. Harper gas is classified as "high-cost natural gas" under NGPA's § 107(c)(1), 15 U. S. C. § 3317(c)(1), because it is taken from a depth of more than 15,000 feet. At the time of the proceedings before appellee State Oil and Gas Board of Mississippi, six separate wells drew gas from the pool. A recognized property of a common pool is that, as gas is drawn up through one well, the pressure surrounding

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ant Attorney General, and *Larry J. Laurent* and *Manual Rios*, Assistant Attorneys General; and for the National Governors' Association by *Benna Ruth Solomon* and *Joyce Holmes Benjamin*.

David Crump filed a brief for the Legal Foundation of America as *amicus curiae*.

that well is reduced and other gas flows towards the area of the producing well. Thus, one well can drain an entire pool, even if the gas in the pool is owned by several different owners. The interests of these other owners often are referred to as "correlative rights." See, *e. g.*, Miss. Code Ann. § 53–1–1 (1972 and Supp. 1985).

Some owners of interests in the Harper Sand pool, such as appellee Getty Oil Co., actually drill and operate gas wells. Others, such as appellee Coastal Exploration, Inc., own smaller working interests in various wells. Normally, these lesser owners rely on the well operators to arrange the sales of their shares of the production, see App. 26, although some nonoperator owners contract directly either with the pipeline that purchases the operator's gas or with other customers.

Appellant Transcontinental Gas Pipe Line Corporation (Transco) operates a natural gas pipeline that transports gas from fields in Texas, Louisiana, and Mississippi for resale to customers throughout the Northeast. Beginning in 1978, Transco entered into 35 long-term contracts with Getty and two other operators, Florida Exploration Co. and Tomlinson Interests, Inc., to purchase gas produced from the Harper Sand pool. In line with prevailing industry practice, the contracts contained "take-or-pay" provisions. These essentially required Transco either to accept currently a certain percentage of the gas each well was capable of producing, or to pay the contract price for that gas with a right to take delivery at some later time, usually limited in duration. Take-or-pay provisions enable sellers to avoid fluctuations in cash flow and are therefore thought to encourage investments in well development. See Pierce, Natural Gas Regulation, Deregulation, and Contracts, 68 Va. L. Rev. 63, 77–79 (1982).

Transco entered into these contracts during a period of national gas shortage. Transco's contracts with Getty and Tomlinson obligated it to buy only Getty's and Tomlinson's own shares of the gas produced by the wells they operated,

while its contracts with Florida Exploration required it to take virtually all the gas Florida Exploration's wells produced, regardless of its ownership. See App. 107. But demand was sufficiently high that Transco also purchased, on a noncontract basis, the production shares of smaller owners, such as Coastal, in the Getty and Tomlinson wells. *Id.*, at 155. In the spring of 1982, however, consumer demand for gas dropped significantly, and Transco began to have difficulty selling its gas. It therefore announced in May 1982 that it would no longer purchase gas from owners with whom it had not actually contracted. See, *e. g.*, *id.*, at 41–42. Transco refused Coastal's request that it be allowed to ratify Getty's contract, and made a counteroffer, which Coastal refused, either to purchase Coastal's gas at a significantly lower price than it was obligated to pay under its existing contracts or to transport Coastal's gas to other customers if Coastal arranged such sales. See *id.*, at 66–69. Fifty-five other noncontract owners of Harper gas, however, did accept such offers from Transco. See 457 So. 2d 1298, 1309 (Miss. 1984).

Getty and Tomlinson cut back production so that their wells produced only that amount of gas equal to their ownership interests in the maximum flow. The immediate economic effect of the cutback was to deprive Coastal of revenue, because none of its share of the Harper gas was being produced. The ultimate geological effect, however, is that gas will flow *from* the Getty-Tomlinson areas of the field, which are producing at less than capacity, *to* the Florida Exploration areas; gas owned by interests that produce through Getty's and Tomlinson's wells thus may be siphoned away. Moreover, because of the decrease in pressure, gas left in the ground, such as Coastal's gas, may become more costly to recover and therefore its value at the wellhead may decline.

II

On July 29, 1982, Coastal filed a petition with appellee State Oil and Gas Board of Mississippi, asking the Board to enforce its Statewide Rule 48, a "ratable-take" requirement. Rule 48 provides:

> "Each person now or hereafter engaged in the business of purchasing oil or gas from owners, operators, or producers shall purchase without discrimination in favor of one owner, operator, or producer against another in the same common source of supply."

Rule 48 never before had been employed to require a pipeline actually to purchase noncontract gas; rather, its sole purpose appears to have been to prevent drainage, that is, to prevent a buyer from contracting with one seller and then draining a common pool of all its gas. See 457 So. 2d, at 1306. The Gas Board conducted a 3-day evidentiary proceeding. It found Transco in violation of Rule 48, and, by its Order No. 409–82, filed Oct. 13, 1982,[1] ordered Transco to start taking gas "ratably" (*i. e.*, in proportion to the various owners' shares) from the Harper Sand pool, and to purchase the gas under nondiscriminatory price and take-or-pay conditions.

Transco appealed the Gas Board's ruling to the Circuit Court of the First Judicial District of Hinds County, Miss. In the parts of its opinion relevant to this appeal, the Circuit Court held that the Gas Board's authority was not pre-

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[1] Order No. 409–82 directed Transco "forthwith to comply with Statewide Rule 48 of the State Oil and Gas Board of Mississippi in its purchases of gas from the said Harper Sand Gas Pool in Greens Creek and East Morgantown Fields, and . . . ratably take and purchase gas without discrimination in favor of one owner, operator or producer against another in the said common source of *[sic]* pool; and, specifically, in the event it so chooses and elects to take and purchase gas produced from the said common pool, Transco shall ratably take and purchase without discrimination in favor of the operators Getty and Tomlinson against Coastal, the Fairchilds, and Inexco." App. to Pet. for Cert. 112a.

empted by either the Natural Gas Act of 1938 (NGA), ch. 556, 52 Stat. 821, 15 U. S. C. § 717 *et seq.*, or the NGPA; that the NGPA effectively overruled *Northern Natural;* and that the Gas Board's order did not run afoul of the Commerce Clause of the United States Constitution.

The Mississippi Supreme Court affirmed that portion of the Circuit Court's judgment. 457 So. 2d 1298 (1984). With respect to Transco's pre-emption claim, the court recognized that, prior to 1978, the Federal Energy Regulatory Commission (FERC) and its predecessor, the Federal Power Commission, possessed "plenary authority to regulate the sale and transportation of natural gas in interstate commerce." *Id.*, at 1314. Under the interpretation of that authority in *Northern Natural*, where a Kansas ratable-take order was ruled invalid because the order "invade[d] the exclusive jurisdiction which the Natural Gas Act has conferred upon the Federal Power Commission," 372 U. S., at 89, Mississippi's "authority to enforce Rule 48 requiring ratable taking had been effectively suspended—preempted, if you will, and any orders such as Order No. 409–82 would have been wholly unenforceable." 457 So. 2d, at 1314. But the court went on to conclude that the enactment of the NGPA in 1978 removed FERC's jurisdiction over "high-cost" gas (the type produced from the Harper Sand pool). Under § 601(a)(1) of the NGPA, "the Natural Gas Act of 1938 (NGA) and FERC's jurisdiction under the Act *never* apply to deregulated gas" (emphasis added), 457 So. 2d, at 1316, and "[t]hat message is decisive of the preemption issue in this case." *Ibid.*

The court also found no implicit pre-emption of Rule 48. Transco's compliance with the Rule could not bring it into conflict with any of FERC's still-existing powers over the gas industry. The court noted that, under *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U. S. 375, 384 (1983), a federal determination that deregulation was appropriate was entitled to as much weight in determining pre-emption as a federal decision to regulate actively.

Although the NGPA stemmed from Congress' desire to deregulate the gas industry, the court found that "[h]owever consistent a continued proscription on state regulation might have been with the theoretical underpinnings of deregulation, the Congress in NGPA in 1978 did not ban state regulation of deregulated gas." 457 So. 2d, at 1318.

In addressing the Commerce Clause issue, the court relied on the balancing test set out in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970): when a state law "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.*, at 142. In weighing the benefit against the burden, a reviewing court should consider whether the local interest "could be promoted as well with a lesser impact on interstate activities." *Ibid.* The court found that Rule 48 had a legitimate local purpose—the prevention of unfair drainage from commonly owned gas pools. It identified the principal burden on interstate commerce as higher prices for the ultimate consumers of natural gas. But, under *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, 186–187 (1950), higher prices do not render a state regulation impermissible *per se* under the Commerce Clause. Also, Congress expressed a clear intent in enacting the NGPA that "all reasonable costs of production of natural gas shall be borne ultimately by the consumer. . . . Congress within the scope of its power under the affirmative Commerce Clause has expressly authorized such increases." 457 So. 2d, at 1321. Transco had identified one other potential burden on interstate commerce: Rule 48 would require it to take more gas from Mississippi's fields than would otherwise be the case, thereby leading Transco to reduce its purchases from Louisiana and Texas. But the Mississippi court rejected this argument, noting both that Texas and Louisiana had their own ratable-take regulations, which presumably would protect

their producers, and that the actual cause of any such effect was Transco's imprudent entry into take-or-pay contracts, rather than the State's ratable-take requirement. Transco knew of Rule 48's existence when it entered into its various contracts and should have foreseen the risk that it would be required to purchase smaller owners' shares. Moreover, since Transco was permitted to pass along its increased costs, the consumer ultimately would bear this burden, which was "simply one inevitable consequence of the free market policies of the era of deregulation with respect to which Transco is vested by the negative Commerce Clause with no right to complain." *Id.*, at 1322.

Finally, the court rejected Transco's argument that the State could have served the same local public interest through a ratable-production order rather than through a ratable-take order. It held that it need not even consider whether less burdensome alternatives to the ratable-take order existed, because Transco had failed to meet the threshold requirement of demonstrating an unreasonable burden on interstate commerce.[2]

III

If the Gas Board's action were analyzed under the standard used in *Northern Natural*, it clearly would be pre-empted. Whether that decision governs this case depends on whether Congress, in enacting the NGPA, altered those characteristics of the federal regulatory scheme which provided the basis in *Northern Natural* for a finding of pre-emption.

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[2]Transco's other claims, a void-for-vagueness challenge, a Takings Clause argument, and various state-law claims, were rejected with one exception. The court found that, although the Gas Board had the power to order Transco to take ratably from the Harper Sand pool, it lacked the power to prohibit Transco from paying different prices for gas owned by nonparties to its original contracts. Therefore, Transco need pay Coastal only the current market price, rather than the higher price it was paying Getty and Tomlinson under its contracts with them.

In that case this Court considered whether the "comprehensive scheme of federal regulation" that Congress enacted in the NGA pre-empted a Kansas ratable-take order. 372 U. S., at 91. Northern Natural Gas Company had a take-or-pay contract with Republic Natural Gas Company to purchase all the gas Republic could produce from its wells in the Hugoton Field. Northern also had contracts with other producers to buy their production, but those contracts required it to purchase their gas only to the extent that its requirements could not be satisfied by Republic. *Id.*, at 87. Northern historically had taken ratably from all Hugoton wells, but, starting in 1958, it no longer needed all the gas the wells in the field were capable of producing. It therefore reduced its purchases from the other wells, causing drainage toward Republic's wells. The Kansas Corporation Commission, which previously had imposed a ratable-production order on the Hugoton producers,[3] then issued a ratable-take order requiring Northern to "take gas from Republic wells in no higher proportion to the allowables than from the wells of the other producers." *Id.*, at 88.

Kansas argued that its order represented a permissible attempt to protect the correlative rights of the other producers. The Court rejected this contention. Section 1(b) of the NGA, 15 U. S. C. § 717(b), provided that the Act's provisions "shall not apply . . . to the production or gathering of natural gas." But the Court, it was said, "has consistently held that 'production' and 'gathering' are terms narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." 372 U. S., at 90. Since Kansas' order was directed not at "a producer but

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[3] A ratable-production order in essence allocates pro rata among interest owners the right to produce the amount of gas demanded. For example, if one interest owner owns 75% of the gas in a common pool with 100 units of gas and demand is 60 units, then the majority owner will be permitted to sell only 45 of his units, even though he owns, and is capable of producing, 75 units.

a purchaser of gas from producers," *ibid.*, Northern, being a purchaser, was not expressly exempted from the Act's coverage.

Although it was "undeniable that a state may adopt reasonable regulations to prevent economic and physical waste of natural gas," *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S., at 185, the Court did not view the ratable-take rule as a permissible conservation measure.[4] Such measures target producers and production, while ratable-take requirements are "aimed directly at interstate purchasers and wholesales for resale." *Northern Natural*, 372 U. S., at 94.

The Court identified the conflict between Kansas' rule and the federal regulatory scheme in these terms: Congress had "enacted a comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce.'" *Id.*, at 91, quoting *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 682 (1954). "[U]niformity of regulation" was one of its objectives. 372 U. S., at 91–92. And, it was said:

> "The danger of interference with the federal regulatory scheme arises because these orders are unmistakably and unambiguously directed at *purchasers* who take gas in Kansas for resale after transportation in interstate commerce. In effect, these orders shift to the shoulders of interstate purchasers the burden of performing the complex task of balancing the output of thousands of natural gas wells within the State . . . . Moreover, any readjustment of purchasing patterns which such orders

[4] The Court noted, 340 U. S., at 185, that it had "upheld numerous kinds of state legislation designed to curb waste of natural resources and to protect the correlative rights of owners through ratable taking, *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U. S. 210 (1932)," but it is clear from the context of that statement that those challenges had involved claims by gas owners under the Due Process and Equal Protection Clauses, rather than claims of federal pre-emption: "These ends have been held to justify control over production even though the uses to which property may profitably be put are restricted." *Id.*, at 185–186.

might require of purchasers who previously took unratably could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States" (emphasis in original). *Id.*, at 92.

Northern Natural's finding of pre-emption thus rests on two considerations. First, Congress had created a comprehensive regulatory scheme, and ratable-take orders fell within the limits of that scheme rather than within the category of regulatory questions reserved for the States. Second, in the absence of ratable-take requirements, purchasers would choose a different, and presumably less costly, purchasing pattern. By requiring pipelines to follow the more costly pattern, Kansas' order conflicted with the federal interest in protecting consumers by ensuring low prices.

Under the NGA, the Federal Power Commission's comprehensive regulatory scheme involved "utility-type ratemaking" control over prices and supplies. See Haase, The Federal Role in Implementing the Natural Gas Policy Act of 1978, 16 Houston L. Rev. 1067, 1079 (1979). The FPC set price ceilings for sales from producers to pipelines and regulated the prices pipelines could charge their downstream customers. But "[i]n the early 1970's, it became apparent that the regulatory structure was not working." *Public Service Comm'n of New York* v. *Mid-Louisiana Gas Co.*, 463 U. S. 319, 330 (1983). The Nation began to experience serious gas shortages. The NGA's "artificial pricing scheme" was said to be a "major cause" of the imbalance between supply and demand. See S. Rep. No. 95–436, p. 50 (1977) (additional views of Senators Hansen, Hatfield, McClure, Bartlett, Weicker, Domenici, and Laxalt).

In response, Congress enacted the NGPA, which "has been justly described as 'a comprehensive statute to govern future natural gas regulation.'" *Mid-Louisiana Gas. Co.*, 463 U. S., at 332, quoting Note, Legislative History of the Natu-

ral Gas Policy Act, 59 Texas L. Rev. 101, 116 (1980). The aim of federal regulation remains to assure adequate supplies of natural gas at fair prices, but the NGPA reflects a congressional belief that a new system of natural gas pricing was needed to balance supply and demand. See S. Rep. No. 95–436, at 10. The new federal role is to "overse[e] a national market price regulatory scheme." Haase, 16 Houston L. Rev., at 1079; see S. Rep. No. 95–436, at 21 (NGPA implements "a new commodity value pricing approach"). The NGPA therefore does not constitute a federal retreat from a comprehensive gas policy. Indeed, the NGPA in some respects expanded federal control, since it granted FERC jurisdiction over the intrastate market for the first time. See the Act's §§ 311 and 312, 15 U. S. C. §§ 3371 and 3372.

Appellees argue, however, that §§ 601(a)(1)(B)(i) and (ii), 15 U. S. C. §§ 3431(a)(1)(B)(i) and (ii), stripped FERC of jurisdiction over the Harper Sand pool gas which was the subject of the Gas Board's Rule 48 order, thereby leaving the State free to regulate Transco's purchases. Section 601(a)(1)(B) states that "the provisions of [the NGA] and the jurisdiction of the Commission under such Act shall not apply solely by reason of any first sale" of high-cost or new natural gas. Moreover, although FERC retains some control over pipelines' downstream pricing practices, § 601(c)(2) requires FERC to permit Transco to pass along to its customers the cost of the gas it purchases "except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds." According to appellees, FERC's regulation of Transco's involvement with high-cost gas can now concern itself only with Transco's sales to its customers; FERC, it is said, cannot interfere with Transco's purchases of new natural gas from its suppliers. Appellees believe that the Gas Board order concerns only this latter relationship, and therefore is not pre-empted by federal regulation of other aspects of the gas industry.

That FERC can no longer step in to regulate directly the prices at which pipelines purchase high-cost gas, however, has little to do with whether state regulations that affect a pipeline's costs and purchasing patterns impermissibly intrude upon federal concerns. Mississippi's action directly undermines Congress' determination that the supply, the demand, and the price of high-cost gas be determined by market forces. To the extent that Congress denied FERC the power to regulate affirmatively particular aspects of the first sale of gas, it did so because it wanted to leave determination of supply and first-sale price to the market. "[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision *to* regulate" (emphasis in original). *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U. S., at 384. Cf. *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, 150–151 (1976).

The proper question in this case is not whether FERC has affirmative regulatory power over wellhead sales of § 107 gas, but whether Congress, in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and the price of natural gas, intended to give the States the power it had denied FERC. The answer to the latter question must be in the negative. First, when Congress meant to vest additional regulatory authority in the States it did so explicitly. See §§ 503(c) and 602(a), 15 U. S. C. §§ 3413(c) and 3432(a). Second, although FERC may now possess less regulatory jurisdiction over the "intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States," *Northern Natural*, 372 U. S., at 92, than it did under the old regime, that relationship is still a subject of deep federal concern. FERC still must review Transco's pricing practices, even

though its review of Transco's purchasing behavior has been circumscribed. See App. 148–150, 170. In light of Congress' intent to move toward a less regulated national natural gas market, its decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the States to impose additional regulations.

Mississippi's order also runs afoul of other concerns identified in *Northern Natural*. First, it disturbs the uniformity of the federal scheme, since interstate pipelines will be forced to comply with varied state regulations of their purchasing practices. In light of the NGPA's unification of the interstate and intrastate markets, the contention that Congress meant to permit the States to impose inconsistent regulations is especially unavailing. Second, Mississippi's order would have the effect of increasing the ultimate price to consumers. Take-or-pay provisions are standard industrywide. See Pierce, 68 Va. L. Rev., at 77–78; H. R. Rep. No. 98–814, pp. 23–25, 133–134 (1984). Pipelines are already committed to purchase gas in excess of market demand. Mississippi's rule will require Transco to take delivery of noncontract gas; this will lead Transco not to take delivery of contract gas elsewhere, thus triggering take-or-pay provisions. Transco's customers will ultimately bear such increased costs, see App. 161, unless FERC finds that Transco's purchasing practices are abusive. In fact, FERC is challenging, on grounds of abuse, the automatic passthrough of some of the costs Transco has incurred in its purchases of high-cost gas. See App. 177–178.[5] In any event, the federal scheme is dis-

[5] On October 31, 1985, FERC issued an initial decision, *Transcontinental Gas Pipe Line Corp.*, 33 FERC ¶63,026, finding that Transco's purchases of Harper Sand gas pursuant to the ratable-take order were not imprudent. But the grounds on which the Administrative Law Judge rested his conclusion demonstrate how Mississippi's action impermissibly interferes with FERC's regulatory jurisdiction.

FERC's staff had requested the judge to order Transco "to pursue a least-cost purchasing strategy *irrespective of Rule 48*." *Id.*, at 65,073 (emphasis in original). The judge refused: "In my view, Transco is entitled,

rupted: if customers are forced to pay higher prices because of Mississippi's ratable-take requirement, then Mississippi's rule frustrates the federal goal of ensuring low prices most effectively; if FERC ultimately finds Transco's practices abusive and refuses to allow a passthrough, then FERC's and Mississippi's orders to Transco will be in direct conflict.

The change in regulatory perspective embodied in the NGPA rested in significant part on the belief that direct federal price control exacerbated supply and demand problems by preventing the market from making long-term adjustments.[6] Mississippi's actions threaten to distort the market once again by artificially increasing supply and price. Although, in the long run, producers and pipelines may be able to adjust their selling and purchasing patterns to take account of ratable-take orders, requiring such future adjustments in an industry where long-term contracts are the norm

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indeed is required, to follow the decisions of the Mississippi authorities until and unless they be overturned by the Supreme Court of the United States." *Id.*, at 65,074.

Had the judge considered FERC's claim on the merits, the conflict between the federal and state schemes would be patent. But his belief that he was constrained to find Transco's practices reasonable because they were undertaken in compliance with Mississippi law is almost as demonstrative of pre-emption. First, Mississippi cannot be permitted to foreclose what would otherwise be more searching federal oversight of purchasing practices. Second, the mere exercise of federal regulatory power, even if it does not result in invalidation of the challenged act, shows continued federal occupation of the field. Since no evidence exists to suggest Congress intended FERC's power to be circumscribed by state action, Rule 48 is pre-empted.

[6] The dissent's complaint that Congress did not intend to decontrol supply and demand, *post*, at 433, n. 5, misses the point. Congress clearly intended to eliminate the distortive effects that NGA price control had had on supply and demand. To suggest that Congress was willing to replace this distortion with a distortion on price caused by a State's decision to require pipelines and, ultimately, interstate consumers, to purchase gas they do not want—the purpose of the order in this case—requires taking an artificially formalistic view of what Congress sought to achieve in the NGPA.

will postpone achievement of Congress' aims in enacting the NGPA. We therefore conclude that Mississippi's ratable-take order is pre-empted.

IV

Because we have concluded that the Gas Board's order is pre-empted by the NGA and NGPA, we need not reach the question whether, absent federal occupation of the field, Mississippi's action would nevertheless run afoul of the Commerce Clause.

The judgment of the Supreme Court of Mississippi is therefore reversed.

It is so ordered.

JUSTICE REHNQUIST, with whom JUSTICE POWELL, JUSTICE STEVENS, and JUSTICE O'CONNOR join, dissenting.

Section 601(a)(1) of the Natural Gas Policy Act of 1978 (NGPA), 92 Stat. 3409, 15 U. S. C. §3431(a)(1), removes the wellhead sales of "high-cost natural gas" from the coverage of the Natural Gas Act (NGA), 15 U. S. C. §§717–717w. Section 121(b) of the NGPA, 15 U. S. C. §3331(b), exempts such gas from any lingering price controls under the NGPA. The Court nonetheless holds that Mississippi's application of its ratable-take rule to high-cost gas in order to "do equity between and among owners in a common pool of deregulated gas," App. to Juris. Statement 28a, is pre-empted by the NGA and NGPA. The Court's opinion misuses the pre-emption doctrine to extricate appellant Transcontinental Gas Pipe Line Corp. (Transco) from a bed it made for itself. I dissent because I do not believe that Mississippi's ratable-take rule invades the exclusive sphere of the NGA, conflicts with the NGPA's purpose of decontrolling the wellhead price of high-cost gas, or runs afoul of the implicit free market policy of the dormant Commerce Clause.

The imposition of a ratable-take rule is a familiar solution of oil and gas law to the problem of "drainage" in a commonly

owned gas pool.[1] When several individuals own gas in a common pool, each has an incentive to remove and capture as much gas as rapidly as possible in order to prevent others from "draining away" his share of the gas reserves. This practice results in a much faster removal rate than a single owner of the same pool would choose, and makes it more difficult to obtain the last amounts of gas in a pool. A ratable-take rule eliminates the perverse incentives of common ownership that otherwise give rise to such economic waste and sharp practice. See *Champlin Refining Co.* v. *Oklahoma Corporation Comm'n*, 286 U. S. 210, 233 (1932).

The controversy in this case centers around the Harper Sand Gas Pool (Harper Pool), which is a pool of "high-cost natural gas" within the definition of that term in § 107(c)(1) of the NGPA, 15 U. S. C. § 3317(c)(1), because it lies more than 15,000 feet beneath the ground and surface drilling for its gas began in 1978.[2] By 1982, there were six wells drawing gas from the Harper Pool. Three were operated by Getty Oil Co., two by the Florida Exploration Co., and one by Tomlinson Interests, Inc. These operators were only part owners of the gas drawn up through their respective wells.

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[1] The withdrawal of gas from a common pool causes changes in pressure, resulting in the migration and spreading out of the remaining gas over the entire pool. This migration is called "drainage" because, from the viewpoint of each owner, the withdrawal of gas by another causes gas to migrate or "drain" away from his end of the pool.

[2] The NGPA defines "high-cost natural gas" as any gas

"(1) produced from any well the surface drilling of which began on or after February 19, 1977, if such production is from a completion location which is located at a depth of more than 15,000 feet;

"(2) produced from geopressured brine;

"(3) occluded natural gas produced from coal seams;

"(4) produced from Devonian shale; and

"(5) produced under such other conditions as the Commission determines to present extraordinary risks or costs." NGPA § 107(c), 92 Stat. 3366, 15 U. S. C. § 3317(c).

They shared ownership rights with a large number of other parties including appellee Coastal Exploration, Inc.

Appellant Transco is an interstate pipeline company that purchases gas from the various owners of the Harper Pool. As each well was drilled between 1978 and 1982, Transco entered into long-term contracts with the well operators to ensure future gas supplies at a fixed price. In this way, Transco bound itself to purchase, and the well operators bound themselves to supply, the well operators' shares of the gas drawn from the common pool. Transco also agreed to a "take-or-pay" clause in each contract, thereby promising to pay the well operators for their shares of the potential gas streams whether or not it took immediate delivery of the gas.

Until May 1982, Transco also purchased the production shares of all of the nonoperating owners. It did so by spot market purchases at prices roughly equal to those it was paying to the contract owners rather than pursuant to fixed-price long-term supply contracts. But Transco announced in May 1982 that, because of a glut in the natural gas market, it would no longer purchase gas on the spot market from the noncontract owners of the Getty and Tomlinson wells. Coastal, which had an ownership interest in gas from one of the Getty wells, thereupon attempted to sell its share of the gas on the spot market to another pipeline company. Failing in this attempt, it then offered to sign a long-term supply contract with Transco on terms identical to those in Transco's contract with Getty. Transco refused Coastal's offer, and made a counteroffer to Coastal which was in turn refused.

Coastal and various noncontract owners then sought relief from the Mississippi Oil and Gas Board (Board), arguing that Transco's disproportionate purchasing of gas from the Harper Pool violated the Board's ratable-take rule (Rule 48), which provides:

> "Each person now or hereafter engaged in the business of purchasing oil or gas from owners, operators, or producers shall purchase without discrimination in favor

> of one owner, operator, or producer against another in the same common source of supply." Statewide Rule 48 of the State Oil and Gas Board of Mississippi as set forth in App. to Juris. Statement 129a.

Transco opposed the relief sought by Coastal because enforcement of the rule would require Transco to purchase the same percentage of each owner's share of the pool's allowable production as it purchased from any other owner's share. Because of the "take-or-pay" obligations in its contracts with the operating owners, this would require it either to take more gas than it could profitably sell to its interstate customers or to pay the operating owners for the percentage of their shares that it did not presently take. Transco therefore urged the Board to reduce the allowable production from the common pool to reflect current market demand or to substitute a "ratable-production" rule for the existing "ratable-take" rule. Had the Board acceded to Transco's proposals, Transco's liability for its realized downside contractual risk resulting from the take-or-pay clauses would have been limited or avoided at the expense of the operating owners with whom it contracted. The Board instead ruled in favor of Coastal and against Transco, finding, *inter alia:*

> "Transco's course of conduct has been to discriminate against the owners (like Coastal) of relatively small undivided working interests in the . . . [w]ells and the common pool produced by the wells simply because they are owners of relatively small undivided interests.
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> . . . . . .
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> "The Board finds that Transco's refusal to ratably take and purchase without discrimination Coastal's share of gas produced from the said common pool from which Transco is purchasing the operators' gas produced from the common pool by [the] very same wells and other wells completed into the common pool (1) is discriminatory in favor of the operators against Coastal and thereby violates Rule 48 . . . ; (2) constitutes 'waste' . . .

> because, among other things, it abuses the correlative rights of Coastal in the common pool, results in non-uniform, disproportionate and unratable withdrawals of gas from the common pool causing undue drainage between tracts of land, and will have the effect and result of some owners in the pool producing more than their just and equitable share of gas from the common pool to the detriment of Coastal . . . ." App. to Juris. Statement 110a–111a.

The Board's order was affirmed by the Circuit Court of Hinds County, Mississippi, and affirmed by the Supreme Court of Mississippi insofar as it required ratable taking, despite Transco's claims of federal pre-emption and violation of the Commerce Clause. 457 So. 2d 1298 (1984).

The Court now reverses on pre-emption grounds. It holds that the ratable-take rule as applied to high-cost gas is pre-empted under the reasoning of *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kansas*, 372 U. S. 84 (1963), even though the NGPA removed the wellhead sales of such gas from the coverage of the NGA. I believe that the NGPA's removal of such gas from the NGA takes this case outside the purview of *Northern Natural*, and that a ratable-take rule such as that imposed by Mississippi is consistent with the NGPA's purpose of decontrolling the wellhead price of high-cost gas.

Congress passed the NGA in 1938 in response to this Court's holding that the Commerce Clause prevented States from directly regulating the wholesale prices of natural gas sold in interstate commerce. See *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298 (1924). The purpose of the NGA was "to occupy the field of wholesale sales of natural gas in interstate commerce." *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 184 (1983). Section 1(b) of the NGA, 52 Stat. 821, 15 U. S. C. § 717(b), defined the NGA's scope:

> "The provisions of this Act shall apply to the *transportation* of natural gas in interstate commerce, to the *sale* in

> interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, *but shall not apply* to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the *production* and *gathering* of natural gas." (Emphasis added.)

Initially, the Federal Power Commission (predecessor to the Federal Energy Regulatory Commission (FERC)) interpreted § 1(b) to extend the NGA's coverage to gas sales at the downstream end of interstate pipelines, but not to sales by local producers to interstate pipelines. See, *e. g.*, *Phillips Petroleum Co.*, 10 F. P. C. 246 (1951); *Natural Gas Pipeline Co.*, 2 F. P. C. 218 (1940). In 1954, however, this Court gave § 1(b) a broader reading. See *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672 (1954). It interpreted the NGA as creating exclusive federal jurisdiction over the regulation of natural gas in interstate commerce, and § 1(b) as extending the NGA's coverage to both downstream and local sales, though not to the production and gathering of natural gas. *Id.*, at 677–678; see also *id.*, at 685–686 (Frankfurter, J., concurring).

Northern Natural Gas Co. v. *State Corporation Comm'n of Kansas*, *supra*, was decided against this backdrop. In *Northern Natural*, the Court held that a state ratable-take rule as applied to the purchases of natural gas by interstate pipelines was pre-empted by the NGA because it constituted an "inva[sion into] the exclusive jurisdiction which the Natural Gas Act has conferred upon the Federal Power Commission over the sale and transportation of natural gas in interstate commerce for resale." *Id.*, at 89. The Court rejected the argument that ratable-take rules "constitute only state regulation of the 'production or gathering' of natural gas, which is exempted from the federal regulatory domain by the terms of § 1(b) of the Natural Gas Act." *Id.*, at 89–90. It

explained that because such rules apply to purchasers, they involve the regulation of wellhead sales. *Id.*, at 90. It also rejected the argument that they do not "threate[n] any actual invasion of the regulatory domain of the Federal Power Commission since [they] 'in no way involv[e] the *price* of gas.'" *Ibid.* (emphasis added). The Court reasoned that the NGA "leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas, . . . or for state regulations which would indirectly" regulate price. *Id.*, at 91. Because ratable-take rules apply to purchasers, they indirectly regulate price and therefore "invalidly invade the federal agency's exclusive domain" of sales regulation.[3] *Id.*, at 92. Finally, the Court explained that although "States do possess power to allocate and conserve scarce natural resources upon and beneath their lands," *id.*, at 93, they may not use means such as ratable-take rules that "threaten effectuation of the federal regulatory scheme." *Ibid.*

The NGPA was passed in 1978 in response to chronic interstate gas shortages caused by price ceilings imposed pursuant to the NGA. Its purpose was to decontrol the wellhead price of natural gas sold to interstate pipelines, allowing prices to rise according to market conditions and causing shortages to vanish. To accomplish this purpose, it divided

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[3] In *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238 (1984), this Court explained that "state law can be pre-empted in either of two general ways." *Id.*, at 248.

"If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. . . . If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Ibid.*

The reasoning of *Northern Natural* is that a state ratable-take rule is pre-empted if it invades the jurisdictional coverage of a statute that falls within the first category of the *Kerr-McGee* pre-emption test—statutes designed to "occupy a given field" to the exclusion of state regulation.

the supply of gas into three major categories: high-cost gas, new gas, and old gas. See Pierce, Natural Gas Regulation, Deregulation, and Contracts, 68 Va. L. Rev. 63, 87–89 (1982). It removed the wellhead sales of high-cost and new gas from the coverage of the NGA. NGPA § 601(a)(1)(B), 15 U. S. C. § 3431(a)(1)(B). It then established formulas for the gradual decontrol of the wellhead prices of such gas. See NGPA §§ 102(b), 103(b), 107(a), 15 U. S. C. §§ 3312(b), 3313(b), 3317(a). The wellhead price of high-cost gas was totally decontrolled in November 1979. See NGPA § 121(b), 15 U. S. C. § 3331(b); Pierce, *supra*, at 87–88. Ceilings continue to apply to the wellhead prices of old gas. See *id.*, at 88–89. Because gas from the Harper Sand Gas Pool qualifies as high-cost gas, the NGA no longer covers its wellhead price. Moreover, to the extent the NGPA ever controlled the wellhead prices of such gas, cf. *Public Service Comm'n of New York* v. *Mid-Louisiana Gas Co.*, 463 U. S. 319 (1983), those controls have long since been eliminated.[4] Therefore, *Northern Natural* does not govern this case. Rather, the issue is whether Mississippi's ratable-take rule stands as an obstacle to the full accomplishment of the NGPA's purpose. See *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 248 (1984).

The purpose of the NGPA with respect to high-cost gas is to eliminate governmental controls on the wellhead price

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[4] FERC's remaining jurisdiction to prevent interstate pipelines from fraudulently, abusively, or otherwise illegitimately passing on higher wellhead prices to ultimate consumers, see 15 U. S. C. § 3431(c)(2), does not include jurisdiction over wellhead price levels. Cf. *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 184 (1983) (state statute directly prohibiting interstate pipelines from passing on severance tax to consumers invades FERC's pass-on jurisdiction); *Maryland* v. *Louisiana*, 451 U. S. 725, 746–752 (1981) (state statute indirectly requiring interstate pipelines to pass on severance tax to consumers invades FERC's pass-on jurisdiction); *id.*, at 747, n. 22 (question whether tax conflicted with FERC's authority to control price of gas expressly reserved).

of such gas.[5] State regulation that interferes with this purpose is pre-empted. See *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U. S. 375, 384 (1983). State regulation that merely defines property rights or establishes contractual rules, however, does not interfere with this purpose. Markets depend upon such rules to function efficiently.

Ratable-take rules serve the twin interests of conservation and fair dealing by removing the incentive for "drainage." On its face, the ratable-take rule here is completely consistent with the free market determination of the wellhead price of high-cost gas. Like any compulsory unitization rule, it gives joint owners the incentive to price at the same level as a single owner. But it will not affect the spot market price of gas in any other way. It is similarly price neutral in the context of long-term contracting. The rule is merely one of a number of legal rules that regulates the contractual relations of parties in the State of Mississippi as in other States. The

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[5]The majority also mentions "supply" and "demand" as economic variables that Congress intended to decontrol. There is no support for this in the legislative history, and the use of these variables unnecessarily complicates and distorts the pre-emption analysis. The NGPA was concerned with supply only to the extent that price ceilings create shortages. The Court has always acknowledged that conservation of the supply of natural gas is traditionally a function of state power. See, *e. g.*, *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kansas*, 372 U. S. 84, 93 (1963). Thus, it has upheld the common state practice of placing ceilings, called "allowables," on the amount of gas that a particular well or pool may produce during a given period. See, *e. g.*, *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U. S. 210 (1932). Such absolute restrictions on output have the potential of raising wellhead prices above competitive equilibrium. Ratable-take rules, by themselves, do not.

There is even less reason to infer a purpose to decontrol demand. To the extent central planners even have the power to control demand, their control is limited to the manipulation of output and price. Planners have no obvious control over individual preferences. It therefore makes little sense to consider "demand" to be an independent object of the NGPA's decontrol purpose.

Court, however, seems to equate Mississippi's rule requiring equitable dealing on the part of pipeline companies purchasing from common owners of gas pools as akin to a tax or a subsidy, both of which do tend to distort free market prices.

Unlike taxes or subsidies, however, rules regulating the conditions of contracts have only an attenuated effect on the operation of the free market. Their effect is often to promote the efficient operation of the market rather than to inhibit or distort it the way a tax or subsidy might. A ratable-take rule applied to a common pool eliminates the inefficiencies associated with the perverse incentives of common ownership of a gas pool. It is different from a rule that would require any out-of-state pipeline that purchases gas from one in-state pool of gas to purchase equal amounts from every other in-state pool. This latter type of rule might well burden interstate commerce or violate the free market purpose of the NGPA. But a ratable-take rule applied to a common pool promotes, rather than inhibits, the efficiency of a competitive market. Moreover, States have historically included ratable-take rules in developing the body of law applicable to natural gas extraction. See, *e. g.*, *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U. S. 210, 233 (1932); *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179 (1950). One may agree that Congress wished to return to the free market determination of the price of high-cost gas without concluding that Mississippi's ratable-take rule frustrates that wish.

Rule 48 was promulgated by the Mississippi Board long before the enactment of the NGPA, and the fact that it had not previously been applied to this type of transaction affords no argument against its validity based on federal pre-emption. Indeed, the implication in the Court's opinion that a midstream expansion in the coverage of a state regulation justifies pre-emption if the party to whom the rule is applied claims disappointed expectations is nothing less than Contract Clause jurisprudence masquerading as pre-emption. A

party runs the risk of reasonably foreseeable applications of new principles of state law to its activities, see *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U. S. 400 (1983), and that is the most that can be said to have happened here. The only reason the ratable-take rule has any adverse effect on Transco is that Transco entered supply contracts with the well operators that included "take-or-pay" obligations. The NGPA gives Transco no basis for insisting that state law be frozen as of the moment it entered the "take-or-pay" agreements, protecting it from the imposition of any additional correlative obligations to noncontracting owners.[6]

Because of my conclusion that Mississippi's ratable-take rule is not pre-empted, I also address appellant's contention that the rule violates the "dormant" Commerce Clause. The analysis is much the same as under the NGPA. Indeed, the implicit "free market" purpose of that Clause would seem to add little to the express congressional purpose to decontrol prices, which is the focus of the pre-emption analysis. Here the statute regulates evenhandedly to effectuate a legitimate local public interest—the interest in both fair dealing on the part of joint owners and conservation—and its effects on interstate commerce are incidental at most. The question of burden, therefore, is "one of degree," *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970).

In *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, *supra*, this Court held that ratable-take rules do not violate the dormant Commerce Clause because they do not place a significant burden on the out-of-state interests in a free market.

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[6] Nor does the ratable-take rule conflict with the NGPA's alleged uniformity or consumer protection purposes. While the congressional desire to *de*control prices uniformly throughout the Nation includes an intent to prevent States from enacting regulation to *re*control them, it does not imply an intent either to create an anarchistic regulatory gap free from property rights and contract rules, or to create a national law of contracts to govern natural gas relationships.

That analysis should control this case. Transco's interest in a free market is not significantly burdened because the ratable-take rule creates no discriminatory burden independent of Transco's supply contracts. The validity of a state rule should not depend on whether, in combination with private contracts, it contributes to a short-run burden. Similarly, enforcement of the ratable-take rule in combination with the take-or-pay obligations does not significantly burden the free-market interest of out-of-state natural gas consumers because the combination will have virtually no effect on consumer prices. High-cost gas makes up only a tiny fraction of the aggregate supply of natural gas. See Pierce, 68 Va. L. Rev., at 88, n. 98 (about 1%). Thus, any increased costs associated with it will tend to be a mere drop in the bucket. Moreover, the rule leaves pipelines free to minimize their losses by simply paying the contract owners their contractual due, and to pay no more than the current spot market price for any noncontract gas it takes. Therefore, enforcement of the rule is unlikely to affect the downstream price that consumers will pay in any significant way.

Nor was it unreasonable for Mississippi to enforce its ratable-take rule when a "ratable-production" rule might have been a less restrictive means of serving the State's legitimate conservation interest. The burden on interstate commerce imposed by the "ratable-take" rule is so minimal and attenuated that there is no occasion to inquire into the existence of a "less restrictive" means. Moreover, a "ratable-production" rule, as even appellant Transco agrees, would place greater administrative and enforcement burdens on the Mississippi regulatory authorities:

> "[A]n order directed to the purchaser of the gas rather than to the producer would seem to be the most feasible method of providing for ratable taking, because it is the purchaser alone who has a first-hand knowledge as to whether his takes from each of his connections in the field are such that production of the wells is ratable. An

> order addressed simply to producers requiring each one to produce ratably with others with whose activities it is unfamiliar and over whose activities it has no control would create obvious administrative problems." *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kansas*, 372 U. S., at 100–101 (Harlan, J., dissenting) (footnotes omitted).

I believe that Mississippi's ratable-take rule as applied to high-cost gas offends neither FERC's jurisdiction, the applicable provisions of the NGPA, or the Commerce Clause. I would therefore affirm the judgment of the Supreme Court of Mississippi.

UNITED STATES *v.* LANE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 84–744. Argued October 9, 1985—Decided January 27, 1986*

James Lane and his son Dennis, respondents in No. 84–744, were indicted on counts for, *inter alia*, mail fraud in connection with insurance claims that were made and that insurers paid for fire damage to a restaurant and duplex that James had hired a professional arsonist to burn. The restaurant was operated by James in partnership with others. Count 1 charged James with mail fraud with regard to that fire. The duplex was owned by a different partnership, of which Dennis was one of the partners. Counts 2 through 4 charged both respondents with mail fraud related to the duplex fire. Count 5 charged both respondents with conspiracy to commit mail fraud in connection with a third arson scheme, and Count 6 charged Dennis with perjury before the grand jury. The Federal District Court denied respondents' pretrial motions for severance on the alleged ground that the charged offenses were misjoined in violation of Federal Rule of Criminal Procedure 8(b), which provides that two or more defendants may be charged in the same indictment if they are alleged to have participated "in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." The trial then proceeded jointly before a jury. When evidence relating to the restaurant fire was admitted, the court instructed the jury not to consider that evidence against Dennis, and repeated this instruction in the final charge and admonished the jury to consider each count and defendant separately. The jury returned convictions on all counts. The Court of Appeals reversed and remanded for new trials, holding that the joinder of Count 1 with the other five counts violated Rule 8(b) and that such misjoinder was prejudicial *per se*. The court, however, rejected respondents' contention that there was insufficient evidence to support convictions under Counts 2 through 4 because each charged mailing occurred after each related insurance payment had been received and thus after each scheme to defraud had reached fruition.

Held:

1. Misjoinder under Rule 8(b) is subject to harmless-error analysis and is not reversible error *per se*. An error involving misjoinder "af-

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*Together with No. 84–963, *Lane et al.* v. *United States*, also on certiorari to the same court.

fects substantial rights" and requires retrial only if the misjoinder results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U. S. 750, 776. It is only by such a holding that Rule 8(b) and Federal Rule of Criminal Procedure 52(a)—which provides that any error "which does not affect substantial rights shall be disregarded"—can be brought into substantial harmony. Here, in the face of overwhelming evidence of guilt, the claimed error was harmless. The District Court provided proper limiting jury instructions, and, moreover, the same evidence on Count 1 would likely have been admissible on joint retrial of the other counts to show James' intent under Federal Rule of Evidence 404(b). Any error therefore failed to have any "substantial influence" on the verdict. Pp. 444–450.

2. There was sufficient evidence to support the convictions on Counts 2 through 4. On the evidence and under proper instructions, the jury could properly find that the mailings charged in Counts 2 and 3 took place while the overall scheme charged in the indictment was still continuing and that the scheme was not completed until after the mailing charged in Count 4, because that mailing, as were the others, was intended to "lull" the insurer into a false sense of security. Pp. 451–453.

735 F. 2d 799, affirmed in part, reversed in part, and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and in Part III of which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN, J., joined, *post*, p. 453. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 465.

Bruce N. Kuhlik argued the cause for the United States. With him on the briefs were former *Solicitor General Lee*, *Acting Solicitor General Fried*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, and *Joel M. Gershowitz*.

Clifford W. Brown argued the cause for respondents in No. 84–744 and petitioners in No. 84–963. With him on the brief was *Robert Michael Brown*.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict among the Circuits as to whether a misjoinder under Rule 8 of the Federal

Rules of Criminal Procedure is subject to the harmless-error rule,[1] and to determine whether there is sufficient evidence in this case to support convictions for mail fraud under 18 U. S. C. § 1341.

I

A

James Lane and three partners opened the El Toro Restaurant in Amarillo, Texas, in the summer of 1978. The business never operated at a profit, however, and sales began to decline that fall. In November, Lane purchased fire insurance covering the building's contents and improvements and any related business losses. Simultaneously, he hired Sidney Heard, a professional arsonist, to burn the building in order to escape the lease and partnership. On February 27, 1979, Heard set a fire that caused smoke damage to the building's contents. Lane first settled with the insurer on the contents and improvements. He then submitted an income statement that falsely indicated the restaurant had operated at a profit. After the insurance adjuster mailed the statement to the insurer's headquarters, Lane settled his business interruption claim.

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[1] Six Circuits have adopted a *per se* approach holding that misjoinder is always reversible error. See *United States* v. *Turkette*, 632 F. 2d 896, 906, and n. 35 (CA1 1980), rev'd on other grounds, 452 U. S. 576 (1981); *United States* v. *Graci*, 504 F. 2d 411, 414 (CA3 1974); *United States* v. *Bova*, 493 F. 2d 33 (CA5 1974); *United States* v. *Bledsoe*, 674 F. 2d 647, 654, 657–658 (CA8), cert. denied *sub nom. Phillips* v. *United States*, 459 U. S. 1040 (1982); *United States* v. *Eagleston*, 417 F. 2d 11, 14 (CA10 1969); *United States* v. *Ellis*, 709 F. 2d 688, 690 (CA11 1983).

Six have subjected misjoinder claims to harmless-error analysis. See *United States* v. *Ajlouny*, 629 F. 2d 830, 843 (CA2 1980), cert. denied, 449 U. S. 1111 (1981); *United States* v. *Seidel*, 620 F. 2d 1006 (CA4 1980); *United States* v. *Hatcher*, 680 F. 2d 438, 442 (CA6 1982); *United States* v. *Varelli*, 407 F. 2d 735, 747–748 (CA7 1969); *United States* v. *Martin*, 567 F. 2d 849, 854 (CA9 1977); *Baker* v. *United States*, 131 U. S. App. D. C. 7, 21–23, 401 F. 2d 958, 972–974 (1968). Most of these courts had previously taken the view that misjoinder is prejudicial *per se*.

In early 1980, Lane again hired Heard to set fire to a duplex that Lane was moving to a vacant lot in Amarillo. Lane obtained a fire insurance policy on the building, listing the owner as L & L Properties, a partnership between his son Dennis Lane and Andrew Lawson. An accomplice of Heard's burned the duplex on May 1, 1980.

Thereafter, on three occasions Dennis Lane signed proof-of-loss claims for repairs and submitted them to an insurance adjuster, who issued drafts in return totaling $12,000.[2] Each time, the adjuster later mailed the proof-of-loss to the insurer's headquarters. The adjuster issued a final settlement draft for $12,250 on September 16, 1980. Two days later, he mailed a memorandum to headquarters explaining why repairs had exceeded previous estimates by some $10,000. He enclosed invoices supplied by Dennis Lane listing various materials and furniture purportedly purchased to repair and refurbish the duplex. In fact, these invoices had been fabricated by James Lane, Heard, and Heard's secretary.

The Lanes and Lawson met with Heard several weeks after the duplex fire to discuss a proposal to establish and burn a flower shop in Lubbock, Texas. Heard and Dennis Lane picked out a suitable building in July 1980, and an accomplice of Heard's, William Lankford, prepared ficticious invoices for merchandise and delivered some artificial flowers to the building later in August. In November, James Lane insured the contents for $50,000. Heard, however, was later arrested for an unrelated crime, and the planned arson never took place.

In March 1981, an Amarillo newspaper article connected Dennis Lane with a scheme to burn the flower shop with Heard; that same day, James Lane canceled the insurance policy. On May 12, 1981, Dennis Lane appeared before a

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[2] Each proof-of-loss form stated that the "loss did not originate by any act, design or procurement on the part of your insured or this affiant" and that "no attempt to deceive [the] company as to the extent of the loss has been made."

federal grand jury investigating Heard. He testified that Heard had nothing to do with the flower shop or with his own dealings with Lankford.

B

James Lane and Dennis Lane were indicted in multiple counts for mail fraud in violation of 18 U. S. C. § 1341, conspiracy in violation of 18 U. S. C. § 371, and perjury in violation of 18 U. S. C. § 1623. Count 1 charged James Lane with mail fraud with regard to the El Toro Restaurant fire. Counts 2 through 4 charged both Lanes with mail fraud related to the duplex fire, and Count 5 charged them with conspiracy to commit mail fraud in connection with the flower shop arson plan. In Count 6, Dennis Lane was charged with perjury before the grand jury.

Prior to trial in the District Court for the Northern District of Texas, the Lanes filed motions for severance contending that the charged offenses were misjoined in violation of Federal Rule of Criminal Procedure 8(b), but the motions were denied and the trial proceeded jointly before a jury. When evidence relating to the El Toro Restaurant fire was admitted, the trial court instructed the jury not to consider that evidence against Dennis Lane. App. 21. The trial judge repeated this instruction in the final charge, together with an instruction regarding the separate consideration to be given each defendant and each count. *Ibid.* The Lanes renewed their severance motions at the end of the Government's evidence and at the close of all evidence, but the motions were again denied. The jury returned convictions on all counts.

On appeal, the Lanes argued that misjoinder under Rule 8(b) had occurred.[3] The Court of Appeals for the Fifth Cir-

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[3] Rule 8(b) provides:

"(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in

cuit concluded that Counts 2 through 6 were properly joined, but agreed "that Count 1 should not have been joined with the others because it was not part of the same series of acts or transactions as Counts 2 through 6." 735 F. 2d 799, 803–804 (1984). The court refused to consider the Government's argument that the error, if any, was harmless, stating only that "Rule 8(b) misjoinder is prejudicial *per se* in this circuit." *Id.*, at 806 (citing *United States* v. *Levine*, 546 F. 2d 658 (CA5 1977)). The court reversed the Lanes' convictions and remanded for new trials.

At the same time, the Court of Appeals rejected the Lanes' contention that there was insufficient evidence to support convictions for mail fraud under Counts 2 through 4 because each charged mailing occurred *after* each related payment had been received, and thus after each scheme had reached fruition.[4] The Court of Appeals distinguished our holding in *United States* v. *Maze*, 414 U. S. 395 (1974), and instead relied on *United States* v. *Sampson*, 371 U. S. 75 (1962), to hold that mailings occurring after receipt of an insurance payment may nevertheless be "in execution of fraud" as required by 18 U. S. C. § 1341 where they are "designed to lull the victims into a false sense of security and postpone investigation." 735 F. 2d, at 807–808.

The court found sufficient evidence for the properly instructed jury to "infer that the mailings were intended to and did have a lulling effect" because they helped persuade the insurer that "the claims were legitimate." *Id.*, at 808. It emphasized that had the proof-of-loss forms not been mailed shortly after issuance of the insurance drafts, the insurer might have been alerted to the possibility of a fraud. *Ibid.*

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one or more counts together or separately and all of the defendants need not be charged in each count."

[4] The Court of Appeals also rejected James Lane's challenge to the sufficiency of the evidence with regard to Count 1. That holding was not challenged in the Lanes' cross-petition.

Similarly, the false invoices submitted by Dennis Lane "gave the impression of a perfectly innocent claim." *Ibid.*

The Government's petition for rehearing was denied. 741 F. 2d 1381 (1984). We granted certiorari, 469 U. S. 1206 (1985). We reverse in part and affirm in part.

II

The Court of Appeals held that misjoinder "is inherently prejudicial."[5] 735 F. 2d, at 804. The Circuits are divided on the question whether misjoinder requires automatic reversal, or whether the harmless-error rule governs.[6] Most Circuits that have adopted the *per se* approach have relied on *McElroy* v. *United States*, 164 U. S. 76 (1896), where this Court applied the joinder statute then in force and reversed convictions of jointly tried defendants after rejecting the Government's argument that there was no showing of prejudice. *Id.*, at 81.

McElroy, however, was decided long before the adoption of Federal Rules of Criminal Procedure 8 and 52, and prior to the enactment of the harmless-error statute, 28 U. S. C. §2111, which provides that on appeal we are to ignore "errors or defects which do not affect the substantial rights of the parties." Under Rule 52(a), we are similarly instructed that any error "which does not affect substantial rights shall be disregarded."[7]

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[5] Although the Government continues to believe that Count 1 was properly joined with Counts 2 through 6, it does not challenge that holding here.

[6] See n. 1, *supra*.

[7] JUSTICE STEVENS' partial dissent argues that *McElroy* conclusively determined misjoinder is prejudicial *per se*, and that Rule 8 was intended to represent a restatement of existing law, including the "rule of the *McElroy* case." *Post*, at 467. Rule 8, however, is simply a procedural rule with certain technical requirements, and JUSTICE STEVENS' opinion refers to the Advisory Committee on Rules' citation of *McElroy*, see *post*, at 468, n. 3, making clear they were referring only to those *technical* requirements of prior law. Nowhere is there any indication Rule 8 was in-

The Court's holding in *Chapman* v. *California*, 386 U. S. 18 (1967), made a significant change in the law of harmless error. There, Justice Black, speaking for the Court, emphasized that even "some constitutional errors [may] be deemed harmless, not requiring the automatic reversal of the conviction." *Id.*, at 22. In rejecting the automatic reversal rule, the Court stated:

> "We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. . . . *We decline to adopt any such rule.*" *Id.*, at 21–22 (emphasis added).

Justice Black went on to note that all 50 States follow the harmless-error approach, and

> "the United States long ago through its Congress established . . . the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.' 28 U. S. C. §2111. None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules." *Id.*, at 22 (footnote omitted).

Since *Chapman*, we have "consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." *United States* v. *Hasting*, 461 U. S. 499, 509 (1983). In *Hasting*, we again emphasized that

> "given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial." *Id.*, at 508–509.

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tended to enshrine any substantive "principle" of *McElroy* that misjoinder requires reversal, nor is there any citation of *McElroy*'s specific holding.

In this case, the argument for applying harmless-error analysis is even stronger because the specific joinder standards of Rule 8 are not themselves of constitutional magnitude.[8] Clearly, *Chapman* and *Hasting* dictate that the harmless-error rule governs here.[9]

The applicability of harmless error to misjoinder also follows from *Kotteakos* v. *United States*, 328 U. S. 750 (1946), a case similar to the one at hand. There, some 32 defendants were charged with one conspiracy, when in fact there had been at least eight separate conspiracies. Nineteen defendants were jointly tried, and seven were convicted. The Court applied the harmless-error statute to an error resulting from a variance from the indictment, and held the error was not harmless in that case. Emphasizing the numerous conspiracies involving unrelated defendants, as well as seriously flawed jury instructions, the *Kotteakos* Court reversed the convictions in light of each of the 32 defendants' "right not to be tried *en masse* for the conglomeration of distinct and separate offenses" involved. *Id.*, at 775.

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[8] Improper joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial.

[9] JUSTICE STEVENS' partial dissent suggests *Chapman* is irrelevant to our analysis because that case involved a *constitutional* violation, whereas the error here is of a nonconstitutional nature. *Post*, at 472. It is difficult to see any logic in the argument that although the harmless-error rule may be applicable to *constitutional* violations, it should not be applied to violations of mere procedural rules. JUSTICE STEVENS recognizes that the standard for harmless-error analysis adopted in *Chapman* concerning constitutional errors is considerably more onerous than the standard for nonconstitutional errors adopted in *Kotteakos* v. *United States*, 328 U. S. 750 (1946). See *post*, at 472–473, n. 11. The heightened regard we have for constitutional protections surely warrants a conclusion that nonconstitutional provisions must be treated at least comparably, and in *Hasting* we emphasized even "most constitutional violations" must be ignored if they are harmless. 461 U. S., at 509.

Although the Court's review in that case was from the perspective of a variance from the indictment, rather than misjoinder, the Court recognized that misjoinder was implicated, and suggested that the harmless-error rule could similarly apply in that context.[10] *Id.*, at 774–775.

A holding directly involving misjoinder again indicated the harmless-error rule should apply. In *Schaffer* v. *United States*, 362 U. S. 511 (1960), three different groups of defendants were charged with participating in separate criminal acts with one other group of three defendants. The indictment also charged all the defendants with one overall count of conspiracy, making joinder under Rule 8 proper. At the close of the Government's case, however, the District Court concluded there was insufficient evidence of conspiracy and dismissed that count. The court then denied a motion for severance after concluding that defendants failed to show prejudice from the joint trial; the Court of Appeals affirmed. This Court recognized that "the charge which originally justified joinder turn[ed] out to lack the support of sufficient evidence." *Id.*, at 516. Essentially, at that point in the trial, there was a clear error of misjoinder under Rule 8 standards. Nevertheless, the *Schaffer* Court held that once the Rule 8 requirements were met by the allegations in the indictment, severance thereafter is controlled entirely by Federal Rule of Criminal Procedure 14, which requires a showing of prejudice. *Id.*, at 515–516. The Court then affirmed the finding of no prejudice. Although the Court did not reach the harmless-error rule because Rule 8(b) had initially been satisfied, the Court's language surely assumed the rule was applicable.

A plain reading of these cases shows they dictate our holding. Applying the 1919 statute treated in *Kotteakos*, which

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[10] The Court pointed out that "the problem is not merely one of variance . . . but is also essentially one of proper joinder." 328 U. S., at 774. Even so, the Court indicated the harmless-error rule must apply, although perhaps with "restraint." *Id.*, at 775.

governed only "technical errors," 28 U. S. C. §391 (1946 ed.), the Court emphasized the clear intent of Congress "was simple: To substitute judgment for automatic application of rules." 328 U. S., at 759–760. "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations." *Id.*, at 762. The Court flatly rejected *per se* rules regarding particular errors because "any attempt to create a generalized presumption to apply in all cases would be contrary not only to the spirit of [the statute] but also to the expressed intent of its legislative sponsors." *Id.*, at 765.

Schaffer discussed the current harmless-error statute, which was enacted in 1949 after *Kotteakos* and deleted the qualifying word "technical" regarding errors governed by the rule. See 28 U. S. C. §2111. The Court again rejected any *per se* rule for joinder errors requiring reversal, refusing to "fashion a hard-and-fast formula that . . . [the] joinder [wa]s error as a matter of law." 362 U. S., at 516. Citing *Kotteakos*, the Court pointed out that there "[t]he dissent agreed that the test of injury resulting from joinder 'depends on the special circumstances of each case.'" 362 U. S., at 517 (quoting 328 U. S., at 777 (Douglas, J., dissenting)).[11]

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[11] Contrary to these clear holdings, JUSTICE STEVENS' partial dissent advocates a rule-by-rule review establishing bright-line *per se* rules whether to conduct harmless-error analysis. *Post*, at 472–474. But on its face, Rule 52(a) admits of no broad exceptions to its applicability. Any assumption that once a "substantial right" is implicated it is inherently "affected" by any error begs the question raised by Rule 52(a). Assuming there is a "substantial right," the inquiry remains whether the error "affects substantial rights" requiring reversal of a conviction. That kind of inquiry requires a review of the entire record. See *United States* v. *Hasting*, 461 U. S., at 509. It is simply too late in the day to argue that Congress intended to incorporate any *per se* rule of *McElroy* for misjoinder following *Kotteakos*, the subsequent enactment of an arguably broader statute, and this Court's prejudice inquiry in *Schaffer*.

In common with other courts, the Court has long recognized that joint trials "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial." *Bruton* v. *United States*, 391 U. S. 123, 134 (1968). Rule 8 accommodates these interests while protecting against prejudicial joinder. But we do not read Rule 8 to mean that prejudice results *whenever* its requirements have not been satisfied.

Under Rule 52(a), the harmless-error rule focuses on whether the error "affect[ed] substantial rights." In *Kotteakos* the Court construed a harmless-error statute with similar language, and observed:

> "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." 328 U. S., at 765.

Invoking the *Kotteakos* test, we hold that an error involving misjoinder "affects substantial rights" and requires reversal only if the misjoinder results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict." *Id.*, at 776. Only by so holding can we bring Rules 8 and 52(a) "into substantial harmony, not into square conflict."[12] *Id.*, at 775.

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[12] Respondents argue that application of the harmless-error rule to Rule 8(b) misjoinder will eviscerate Rule 14, which provides the trial court with discretion to grant a severance even if the joinder is proper under Rule 8 when it believes the defendants or the Government may be prejudiced by a joinder. We see no conflict with our holding and the applicability of Rule 14. Rule 14's concern is to provide the trial court with some flexibility when a joint trial may appear to risk prejudice to a party; review of that decision is for an abuse of discretion. Rule 8(b), however, requires the granting of a motion for severance unless its standards are met, even in the absence of prejudice; review on appeal is for an error of law. Applying the harmless-error rule to Rule 8(b) misjoinder simply goes to the additional question whether the error requires setting aside the convictions. We

Of course, "we are not required to review records to evaluate a harmless-error claim, and do so sparingly, [but] we plainly have the authority to do so." *United States* v. *Hasting*, 461 U. S., at 510 (footnote omitted).

In the face of overwhelming evidence of guilt shown here, we are satisfied that the claimed error was harmless. When evidence on misjoined Count 1 was introduced, the District Court provided a proper limiting instruction, and in the final charge repeated that instruction and admonished the jury to consider each count and defendant separately. Moreover, the same evidence on Count 1 would likely have been admissible on joint retrial of Counts 2 through 6 to show James Lane's intent under Federal Rule of Evidence 404(b). Any error therefore failed to have any "substantial influence" on the verdict. *Kotteakos*, *supra*, at 765.[13]

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need not decide whether the degree of prejudice necessary to support a Rule 14 motion for severance is identical to that necessary to require reversal for a Rule 8(b) error.

JUSTICE STEVENS' partial dissent fails to recognize that the Rule 14 prejudice component involves a different inquiry from the Rule 8 technical requirements. Indeed, the express language of Rule 14, as well as the Advisory Committee Note, shows that Congress tolerates some Rule 8 joinders even when there is prejudice. The first hurdle in obtaining a severance under Rule 14 is a showing of prejudice, and if shown, it remains in the district court's discretion whether to grant the motion.

[13] We can agree with JUSTICE STEVENS' partial dissent "that the harmless-error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry." *Post*, at 476; our reliance on the *Kotteakos* test makes that clear. See *supra*, at 449. But that does not in any sense mean that overwhelming evidence of guilt is irrelevant; the threshold of overwhelming evidence is far higher than mere sufficiency to uphold conviction.

Nor may proper limiting instructions or jury charges never be "an adequate response" to a prejudice inquiry. *Post*, at 477. Contrary to the suggestion of the dissent, *Blumenthal* v. *United States*, 332 U. S. 539 (1947), provides direct support for the Court's approach in this case. There the Court recognized that, *in the context of mass trials* (as in *Kotteakos*), limiting instructions on evidence admissible only as to one defendant might in some circumstances be inadequate to prevent prejudice. 332 U. S.,

III

Respondents challenge the sufficiency of the evidence to sustain their convictions. To find a violation of the mail fraud statute, 18 U. S. C. § 1341,[14] the charged "mailings" must be "for the purpose of executing the scheme." *Kann* v. *United States*, 323 U. S. 88, 94 (1944). Mailings occurring after receipt of the goods obtained by fraud are within the statute if they "were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the

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at 559–560. But here, as in *Blumenthal*, we are not faced with any trial en masse of numerous defendants and unrelated crimes.

When there are few defendants and the trial court is aware of the potential for prejudice, "the risk of transference of guilt over the border of admissibility [may be] reduced to the minimum" by carefully crafted limiting instructions with a strict charge to consider the guilt or innocence of each defendant independently. *Id.*, at 560. We cannot necessarily "assume that the jury misunderstood or disobeyed" such instructions. *Id.*, at 553. Indeed, this Court's conclusion in *Schaffer* that defendants failed to show prejudice was based directly on the fact that "the judge was acutely aware of the possibility of prejudice and was strict in his charge—not only as to the testimony the jury was not to consider, but also as to that evidence which was available in the consideration of the guilt of each [defendant] separately under the respective substantive counts." 362 U. S., at 516.

The same caution was exercised by the trial judge here, and no different result should be required. The Government initially observes that because of the similarity of each arson scheme, "only the court of appeals' narrow reading of Rule 8" led to its finding of misjoinder. At trial, Heard and Lankford—two principal actors—testified against both Lanes, who relied essentially on denials or character defenses. Moreover, the evidence as to Count 1 was distinct and easily segregated from evidence relating to Counts 2 through 6. The misjoinder error, if any, in these circumstances was harmless.

[14] The statute provides in relevant part:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . for the purpose of executing such scheme or artifice . . . , places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, . . . or knowingly causes to be delivered by mail . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." *United States* v. *Maze*, 414 U. S., at 403. See *United States* v. *Sampson*, 371 U. S. 75 (1962).

Only Counts 2 through 4, involving the duplex fire, are at issue. The Lanes argue that each mailing occurred after irrevocable receipt of the related payment, and thus after each scheme to defraud came to fruition.[15] This argument misconstrues the nature of the indictment, which charged an overall scheme to defraud based on the events surrounding the duplex fire. Counts 2 through 4 merely relate to separate mailings concerning partial payments that were a part of the whole scheme. The jury could properly find the scheme, at the earliest, was not completed until receipt of the last payment on September 16, 1980, which finally settled their claim. Hence, the mailings charged in Counts 2 and 3 clearly took place while the scheme was still continuing.

Moreover, the jury could reasonably have found that the scheme was not completed until the final mailing on September 18, 1980, charged in Count 4, because that mailing was intended (as were the two earlier ones) to "lull" the insurer into a false sense of security.[16] The jury was properly in-

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[15] The Government contends that undisputed testimony shows the insurance drafts issued to the Lanes, unlike normal business checks, were not payable on demand but only upon authorization from the insurer's home office when they arrived at the insurer's bank for collection. If the drafts deposited by the Lanes had been dishonored by the insurer's banks, the amounts would have been charged against their account. The Lanes, therefore, may not have irrevocably received the proceeds of the fraud prior to the final mailing. See Brief for United States 30–31. The Court of Appeals, however, did not rely on this argument, and we decline to resolve this factual issue here.

[16] Our conclusion that the delayed mailings at issue in this action were part of an ongoing scheme to defraud is in accord with our holding in *United States* v. *Sampson*, 371 U. S. 75 (1962). In that case, defendants purported to help businessmen obtain loans or sell their businesses in exchange for an "advance fee." *Id.*, at 77. Following the deposit of checks for these fees, the defendants' plan called for the mailing of a form letter assuring the victims of the fraud that they were receiving the services they

structed that each charged mailing must have been made both "for the purpose of executing the scheme to defraud," App. 22, and *prior* to the scheme's completion, *id.*, at 23, and further that mailings "which facilitate concealment of the scheme" are covered by the statute.[17] *Id.*, at 24.

The judgment of the Court of Appeals, ordering a new trial based on misjoinder of Count 1 with Counts 2 through 6, is reversed in part and affirmed in part, and the action is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, joined by JUSTICE BLACKMUN, concurring in part and dissenting in part.

I agree that the evidence was sufficient to sustain the mail fraud convictions and therefore join Part III of the Court's

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paid for. *Id.*, at 78. The Court upheld defendants' convictions for mail fraud because of the "lulling effect" of the delayed mailings.

We see no conflict with our holding in *United States* v. *Maze*, 414 U. S. 395 (1974). There, use of a stolen credit card led to the mailing of charge statements to a bank. We held that the fraud was completed upon the defrauder's receipt of the goods, distinguishing *Sampson* because the mailing of the charge slips, rather than acting to "lull" the bank into acquiescence, instead "increased the probability that [the defrauder] would be detected and apprehended." 414 U. S., at 403. Had the Lanes failed to submit timely proof-of-loss forms here, the insurer might very well have discovered the fraud.

The Lanes contend that the Fifth Circuit's decision in this action also conflicts with *United States* v. *Ledesma*, 632 F. 2d 670 (CA7), cert. denied, 449 U. S. 998 (1980), which reversed a conviction involving the mailing of a fraudulent proof-of-loss form after receipt of insurance proceeds. In that case, however, the Seventh Circuit never discussed *Sampson* or the possibility that the delayed mailing had any "lulling" effect.

[17] The Lanes argue that the Government must show that the charged mailings were specifically intended to lull, rather than showing simply a general intention on their part to defraud, in order to come within *Sampson*'s holding. We need not determine whether any such specific intent must be shown, as we agree with the Court of Appeals that there was sufficient evidence for the jury to infer specific intent to lull here under these instructions, which the Lanes did not challenge on appeal or in their cross-petition.

opinion. I also agree that the Court of Appeals erred in holding that misjoinder under Rule 8 of the Federal Rules of Criminal Procedure is prejudicial *per se*. I write separately, however, because my reasons for reaching this conclusion differ from the Court's, and because I agree with JUSTICE STEVENS that the harmless-error inquiry should be made in the first instance by the Court of Appeals.

I

The Act of February 26, 1919 (1919 Act), 40 Stat. 1181, amended § 269 of the Judicial Code. It provided in part:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." 28 U. S. C. § 391 (1925–1926 ed.).

In 1949, this provision was reenacted in its current form as 28 U. S. C. § 2111, and now instructs appellate courts to "give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." The 1919 Act was also incorporated in the Federal Rules of Criminal Procedure, and Rule 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." See also, Fed. Rule Civ. Proc. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties"). Although § 2111 and Rule 52(a) refer to "errors or defects" without the qualifying word "technical," this change did not alter the substantive legal test. See H. R. Rep. No. 352, 81st Cong., 1st Sess., 18 (1949) (§ 2111 "[i]ncorporates" former harmless-error statute); Advisory Committee's

Notes on Fed. Rule Crim. Proc. 52(a), 18 U. S. C. App., p. 657 (Rule is a "restatement of existing law").

The 1919 Act, § 2111, and Rule 52(a) all provide that an error is to be disregarded unless it "affects the substantial rights of the parties." This litigation thus presents a straightforward question of statutory construction: what does the phrase "affects the substantial rights of the parties" mean? Respondents in No. 84–744 contend that the term "substantial rights" refers to a particular class of rights which are essential to a fair trial and argue that errors which "affect" these rights cannot be disregarded on appeal. According to respondents, the 1919 Act, as reenacted in § 2111 and Rule 52(a), incorporated our holding in *McElroy* v. *United States*, 164 U. S. 76 (1896), that joinder is one of these "substantial rights," so that misjoinder is *per se* reversible.

For the reasons which follow, I conclude that the question whether a particular error "affects the substantial rights of the parties" does not entail a process of classification, whereby some rights are deemed "substantial" and errors affecting these rights are automatically reversible. Rather, an error "affects substantial rights" only if it casts doubt on the outcome of the proceeding. In other words, subject to the exceptions discussed in Part II (most importantly the exception for constitutional errors), I read § 2111 and Rule 52(a) to require harmless-error inquiry for all procedural errors. As none of these exceptions is applicable to misjoinder in violation of Rule 8, I concur in the Court's result on this issue.

Reference to whether error "affected the substantial rights of the parties" was not invented by Congress in 1919. The phrase was commonly used by courts throughout the 19th century to express the conclusion that particular claims of error did or did not warrant reversal. However, as used by these courts, error which "affected the substantial rights of the parties" was generally understood to refer, not to errors respecting a particular class of rights, but rather to any error which affected the fairness of the trial as a whole by calling

into question the reliability of the result. See, *e. g.*, *Connors* v. *United States*, 158 U. S. 408, 411, 414 (1895); *Maish* v. *Arizona*, 164 U. S. 599, 602 (1896); *Williams* v. *United States*, 168 U. S. 382, 390–398 (1897); *American Surety Co.* v. *Pauly*, 170 U. S. 133, 159 (1898); *McCabe & Steen Constr. Co.* v. *Wilson*, 209 U. S. 275, 279 (1908); *Holmgren* v. *United States*, 217 U. S. 509, 523–524 (1910). In other words, the statement that an error did not "affect the substantial rights of the parties" was a way of stating the conclusion that the error was not prejudicial.

A careful reading of *McElroy* demonstrates that it is consistent with this understanding of the phrase "affects the substantial rights of the parties." In *McElroy*, five defendants were charged in two indictments with separate assaults and in a third indictment with arson. Three of the defendants were also charged in yet a fourth indictment with another assault. After explaining these charges, the Court noted that "it is the settled rule . . . to confine the indictment to one distinct offence or restrict the evidence to one transaction" because "[i]n cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defence, or to prejudice him as to his challenges . . . ." 164 U. S., at 80. The Court then stated: "Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is revisable on error." *Ibid.* In context, this merely restates the common-law understanding that an error is reversible if it prejudices the defendant. The Court did not state that joinder is a "substantial right" and, for this reason, any error respecting joinder is reversible. Rather, the Court held that "[i]t cannot be said in [a case of improper joinder] that all the defendants may not have been embarrassed and prejudiced in their defence, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions." *Id.*, at 81. In other words, the

Court concluded that misjoinder is the kind of error which must be presumed to have prejudiced the accused and, for *that* reason, misjoinder affects his "substantial rights." As discussed in Part II, the irrebuttable presumption that misjoinder is prejudicial is inconsistent with the Court's subsequent harmless-error jurisprudence and can be overruled. For the moment, however, it is important only to note that nothing in *McElroy* suggests that the requirement that error have "affect[ed] the substantial rights of the parties" refers to anything other than that the error have been prejudicial.

Absent some contrary indication, then, it would seem logical to conclude that when Congress used the phrase "affect[s] the substantial rights of the parties" in the 1919 Act, Congress meant to require an inquiry into whether an error cast doubt on the verdict, not to create a class of rights as to which error was *per se* reversible. The legislative history of the 1919 Act confirms that this was in fact what Congress intended.

The primary impetus for the enactment of the 1919 Act was the practice in some jurisdictions of reversing convictions on appeal for any procedural error at trial, without regard to whether the error was prejudicial. See *Kotteakos* v. *United States*, 328 U. S. 750, 758–759 (1946). There was also concern over the inconsistent application of harmless-error analysis by other courts, this Court in particular. See H. R. Rep. No. 913, 65th Cong., 3d Sess., 2 (1919) (quoting H. R. Rep. No. 611, 62d Cong., 2d Sess., 2 (1912)). The large number of reversals which resulted from failure to scrutinize errors for their prejudicial effect was criticized by leaders of the legal profession, including Taft, Pound, Wigmore, and Hadley. See *Kotteakos*, *supra*, at 758–759. After prolonged consideration, Congress responded to this criticism by passing the 1919 Act. The House Report accompanying the Act explained:

> "'It is the purpose of the . . . bill to enact, in so far as the appellate courts are concerned, that in the consideration

in an appellate court of a writ of error or an appeal judgment shall be rendered upon the merits without permitting reversals for technical defects in the procedure below and *without presuming that any error which may appear had been of necessity prejudicial to the complaining party.*'" H. R. Rep. No. 913, *supra*, at 2 (quoting H. R. Rep. No. 611, *supra*, at 2) (emphasis added).

The theme that reversal be limited to prejudicial errors is found throughout the legislative history. For example, the Report accompanying the first version of the bill to pass the House of Representatives explained the meaning of the requirement that error be disregarded unless it "affect[s] the substantial rights of the parties" by quoting from an article by President Taft: "'No judgment of the court below should be reversed except for an error which the court, after hearing *[sic]* the entire evidence, can affirmatively say would have led to a different verdict.'" H. R. Rep. No. 1949, 61st Cong., 3d Sess., 1 (1911) (quoting Taft, The Administration of Criminal Law, 15 Yale L. J. 1, 16 (1905)). The Report criticized the practice of reversing judgments for errors which "did not in the least affect the substantial rights of the parties, *the real merits of the case having been properly adjudicated upon the first trial.*" H. R. Rep. No. 1949, *supra*, at 2 (emphasis added). See also, *ibid.* (quoting Justice O'Gorman of the New York Supreme Court to the effect that "[o]ne of the gravest faults with our present mode of trial is the ease and frequency with which judgments are reversed on technicalities which do not affect the merits of the case, and which at no stage of the case have affected the merits"); H. R. Rep. No. 1218, 63d Cong., 3d Sess. (1914); H. R. Rep. No. 264, 64th Cong., 1st Sess. (1916).

Our decision in *Kotteakos* v. *United States*, *supra*, forecloses any remaining questions as to the interpretation of the phrase "affects substantial rights of the parties." In *Kotteakos*, we expressly rejected the argument that the 1919 Act required a determination of "what are only technical,

what substantial rights; and what really affects the latter hurtfully." 328 U. S., at 761. We held instead that the Act's command to disregard errors unless they "affect the substantial rights of the parties" was a command not to overturn a conviction unless, after examining the record as a whole, the court concludes that an error may have had "substantial influence" on the outcome of the proceeding. *Id.*, at 765. Justice Rutledge's explanation, which includes a description of the proper analysis to apply in evaluating the effect of procedural errors, is well worth repeating:

> "It comes down on its face to a very plain admonition: 'Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects.' . . .
>
> "Easier was the command to make than it has been always to observe. This, in part because it is general; but in part also because the discrimination it requires is one of judgment transcending confinement by formula or precise rule. That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another.
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> . . . . .
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> "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations. Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance

for decision on the case as a whole, are material factors in judgment.

. . . . .

"If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.*, at 760–765 (citations and footnotes omitted).[1]

II

This interpretation of § 2111 and Rule 52(a) as requiring examination of the prejudicial effect of all procedural errors is subject to several exceptions. First, and most importantly, constitutional errors are governed by the Due Process Clauses of the Fifth and Fourteenth Amendments rather than by § 2111 and Rule 52(a). See *Chapman* v. *California*, 386 U. S. 18 (1967); *United States* v. *Hasting*, 461 U. S. 499 (1983). Thus, the test for harmless constitutional error is stricter than its statutory counterpart. Compare, *Chapman*, *supra*, at 24 (prosecution must establish that the error

[1] It scarcely needs repeating that, since correction may come from the legislature, considerations of *stare decisis* are at their strongest when this Court confronts its previous constructions of a statute. Cf. *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–407 (1932) (Brandeis, J., dissenting).

was "harmless beyond a reasonable doubt"), with *Kotteakos*, 328 U. S., at 765 (error is harmless unless it had "substantial influence" on the outcome or leaves one in "grave doubt" as to whether it had such effect).[2] In addition, Congress may, of course, expressly provide that a particular right is excluded from the operation of the harmless-error rule. Neither of these exceptions applies to misjoinder in violation of Rule 8, however. Misjoinder does not ordinarily rise to the level of a constitutional violation,[3] and nothing in the language or

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[2] Until *Chapman* v. *California*, 386 U. S. 18 (1967), harmless-error analysis was considered inapplicable to errors respecting constitutional rights. See *id.*, at 42–44 (Stewart, J., concurring in result) ("[I]n a long line of cases, involving a variety of constitutional claims in both state and federal prosecutions, this Court has steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless'" (citing and discussing examples)); see also, *Kotteakos*, 328 U. S., at 764–765, and n. 19. In *Chapman*, we altered this practice and held that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." 386 U. S., at 22. Although we have since held that the *Chapman* harmless-error test applies to "most constitutional violations," *United States* v. *Hasting*, 461 U. S., at 509, harmless-error analysis remains inapplicable to many constitutional rights. *E. g.*, *Vasquez* v. *Hillery*, *ante*, p. 254 (discrimination in grand jury selection); *Connecticut* v. *Johnson*, 460 U. S. 73, 84–88 (1983) (opinion of BLACKMUN, J.) (*Sandstrom* violation); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (right to counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (right to impartial tribunal).

Because the source and nature of the harmless-error test for constitutional errors does not derive from § 2111 or Rule 52(a), our cases concerning constitutional errors do not affect, and are not affected by, our decision today, which applies only to the statutory harmless-error doctrine.

[3] But cf. *Bruton* v. *United States*, 391 U. S. 123 (1968). It is also possible that a particular case of misjoinder may be so egregious as to constitute a deprivation of due process. If this were the case, the error would be governed by *Chapman* rather than by § 2111 or Rule 52(a). See n. 4, *infra*. Of course, a joinder of claims or parties that was so improper as to violate the Due Process Clause would undoubtedly also be prejudicial.

history of either the statutory harmless-error provisions or Rule 8 indicates that Congress chose to except misjoinder from harmless-error scrutiny.[4]

JUSTICE STEVENS' partial dissent recognizes two further exceptions: (1) "when an independent value besides reliability of the outcome suggests that [harmless-error] analysis is inappropriate," and (2) "when the harmlessness of the error cannot be measured with precision." *Post*, at 474. Although the cases he cites to support these additional exceptions involved constitutional errors, JUSTICE STEVENS may well be correct in asserting that they also apply to errors governed by the statutory harmless-error provisions. I need not decide that question to conclude, as does JUSTICE STEVENS, that—like the first two exceptions—neither applies to misjoinder.

The applicability of the exception to protect values other than reliability is easily disposed of. Rules respecting joinder are based on recognition that the multiplication of charges or defendants may confuse the jury and lead to inferences of habitual criminality or guilt by association. *McElroy*, 164 U. S., at 80. Apart from this, however, joinder rules do not serve "an independent value besides reliability of the outcome" justifying an exception to the harmless-error principle. Surely it cannot be maintained that misjoinder affects a right so fundamental to a fair trial that it "'infect[s] the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained.'" *Post*, at 474, n. 15 (quoting *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (STEVENS, J., dissenting)).

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[4] As explained above, the 1919 Act was not intended to codify a rule of *per se* reversal for particular rights, much less for misjoinder. Similarly, as the majority points out, nothing in the legislative history of Rule 8 indicates an intent to do anything more then set forth the technical requirements for and limitations on the joinder of claims or defendants. *Ante*, at 444–445, n. 7.

The exception for errors as to which the prejudicial effect cannot be measured with precision requires closer consideration. As previously noted, *McElroy* held that misjoinder is *per se* reversible because a court can never safely conclude that it was not prejudicial. 164 U. S., at 81. However, trial courts routinely inquire into possible prejudice from joint trials when considering motions for severance under Federal Rule of Criminal Procedure 14, and appellate courts just as routinely perform that inquiry in reviewing Rule 14 rulings.[5] To be sure, problems of jury confusion arising from misjoinder may be substantial. It is also quite easy for the jury to be prejudiced by evidence of other crimes or by inferences from an accused's association with other defendants. Thus, it may be that, once the proper test for harmless error is applied, most misjoinders will in fact result in reversal. However, the prejudice that may result from misjoinder is not so difficult to ascertain that it must always be presumed to be present. Whatever force the holding in *McElroy* may once have had, its precedential force has been greatly eroded by the 1919 Act, whose legislative history disapproves of such presumptions, *supra*, at 457–458, and by subsequent decisions such as *Kotteakos*.[6] Today, adherence to the view that misjoinder is *per se* prejudicial would stand out as a stark and unjustified anomaly, leading to just the sort of unnecessary reversals that inspired enactment of the

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[5] The Court correctly notes in its opinion, see *ante*, at 449–450, n. 12, that while the nature of the inquiry under Rules 8 and 14 is similar, the purposes and scope of these Rules are different.

[6] *Kotteakos* rejected the argument that variance between the indictment and proof at trial should be *per se* reversible because such errors "naturally" result in prejudice. Relying on the legislative history of the harmless-error rule, the Court concluded that such presumptions should not lightly be inferred. "The only permissible presumption," the Court said, "would seem to be particular, arising from the nature of the error and 'its natural effect' for or against prejudice in the particular setting." 328 U. S., at 765–766.

1919 Act. To the extent that *McElroy* states a contrary holding, I would overrule it.

III

The Court goes on to resolve the harmless-error question. I respectfully dissent. To begin with, I agree with JUSTICE STEVENS that "[u]ndertaking a harmless-error analysis is perhaps the least useful function that this Court can perform." *Post*, at 476. See *United States* v. *Hasting*, 461 U. S., at 520, n. 2 (opinion of BRENNAN, J.); see also, *Connecticut* v. *Johnson*, 460 U. S. 73, 102 (1983) (POWELL, J., dissenting). Having concluded that a harmless-error inquiry is required, I, like JUSTICE STEVENS, think we should remand to the Court of Appeals, which is in a better position than we are to study the complete trial record with care.

Moreover, it is apparent that the Court's perfunctory effort to evaluate the effect of this error is inadequate. The Court tells us simply that the error is harmless "[i]n the face of overwhelming evidence of guilt shown here . . . ." *Ante*, at 450. But where is the "examination of the proceedings in their entirety" called for by *Kotteakos?* See 328 U. S., at 762. *Kotteakos* instructs the reviewing court to "ponde[r] all that happened without stripping the erroneous action from the whole," and expressly states that "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *Id.*, at 765. Obviously, the existence of overwhelming evidence is relevant to determining the "effect the error had or reasonably may be taken to have had upon the jury's decision." *Id.*, at 764. But I would have thought it equally obvious that, at the very least, consideration of the magnitude of the error in the context of the trial would also be called for; this the Court has not done. The Court also tells us that the error was harmless because the same evidence "would likely have been admissible" at a joint retrial of the defendants without the improper count. *Ante*, at 450. However, as I thought

Kotteakos made clear, that is irrelevant. The crucial thing is the effect the error had in the proceedings which actually took place, not whether the same thing could have been done in hypothetical proceedings. See 328 U. S., at 762–765. Harmless-error analysis is not an excuse for overlooking error because the reviewing court is itself convinced of the defendant's guilt. The determination of guilt is for the jury to make, and the reviewing court is concerned solely with whether the error may have had a "substantial effect" upon that body.

Justice Traynor of the California Supreme Court wrote that "the evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex." R. Traynor, The Riddle of Harmless Error 80 (1970). It is a task this Court is manifestly ill-equipped to undertake. See *United States* v. *Hasting*, *supra*, at 516–518 (STEVENS, J., concurring in judgment). I would remand the cases for the Court of Appeals to undertake the task.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

Rule 52(a) of the Federal Rules of Criminal Procedure provides:

> "Harmless Error. Any error, defect, irregularity or variance which *does not affect substantial rights* shall be disregarded." (Emphasis added.)

The question presented in No. 84–744 is whether a misjoinder of defendants prohibited by Rule 8(b) is an error which affects substantial rights.[1] In my opinion, the Court

[1] Rule 8(b) of the Federal Rules of Criminal Procedure provides: "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

has answered that question incorrectly; moreover, its opinion unfortunately confuses rather than clarifies the law of "harmless error."

I

Our central task is, of course, to construe Rule 8(b) of the Federal Rules of Criminal Procedure. Thus, we must consider the history, purpose, and language of that Rule.

Prior to the adoption of the Federal Rules of Criminal Procedure, this Court decided that the misjoinder of defendants, as well as the misjoinder of offenses, was an error that deprived the accused of "a substantial right." *McElroy* v. *United States*, 164 U. S. 76, 80 (1896). *McElroy* concerned both kinds of misjoinder. Five defendants were charged with offenses committed on April 16, 1894, and May 1, 1894, but only three of them were charged with a separate offense committed on April 16, 1894. The two defendants who were not charged with the separate offense made essentially the same objection to their joint trial as did Dennis Lane in this case. As to those two defendants, the Government confessed error and the Court unanimously reversed and remanded for a new trial.[2] As to the other three defendants,

[2] "It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried.

. . . . . .

"It is admitted by the government that the judgments against Stufflebeam and Charles Hook must be reversed . . . ." 164 U. S., at 80.

In confessing error, the Government seemed to concede that reversal was appropriate without any specific showing of prejudice. See Brief for United States in *McElroy* v. *United States*, O. T. 1896, No. 402, p. 6 ("It cannot be certainly affirmed that Stufflebeam and Charles Hook were not embarrassed and prejudiced, in their defense to the indictments under which they stood charged, by the fact that they were compelled to make their defense in a proceeding in which McElroy, Bland, and Hook were prosecuted for arson committed April 16, 1894, which was on the same day of the assaults and fifteen days before the arson for which they were tried").

the majority of the Court held that a misjoinder of offenses had occurred, and required a new trial without any special showing of prejudice. After reviewing the misjoinder of defendants and of offenses, the Court concluded:

> "Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is revisable on error." *Ibid.*

Thus, almost a half century before the adoption of Rule 8, the Court squarely held that protection against misjoinder was a "substantial right," and that the violation of the misjoinder rule required reversal.

Today, the Court does not dispute that *McElroy* required reversal for misjoinder. Instead, the Court suggests, rather obliquely, that three developments have undermined that holding: (1) the adoption of Rule 8; (2) the adoption of Rule 52(a) and the passage of the harmless-error statute; and (3) the development of a harmless-error doctrine in constitutional law. *Ante*, at 444–446. The reliance on the harmless-error developments will be addressed in more detail. Since we are construing Rule 8, however, the majority's bare citation to it—and apparent reliance on the history of its passage—must be first considered.

The majority seems to be of the view that the adoption of Rule 8 cast doubt on the validity of *McElroy*. *Ante*, at 444. Far from disavowing *McElroy*, however, the Federal Rules continued the misjoinder rule. The notes of the Advisory Committee on Rules state that both subdivisions of Rule 8 represent "substantially a restatement of existing law." Neither the text of Rule 8, nor the Advisory Committee Notes, nor the history of the Rule contains *any* suggestion that Rule 8 was intended to change the rule of the *McElroy* case. Indeed, the Advisory Committee displayed a keen awareness of the *McElroy* precedent by citing the opinion in

its discussion of misjoinder.[3] At the time the Federal Rules were being considered, moreover, commentators shared the Advisory Committee's view that the Rules merely continued the misjoinder doctrine in its then current form, and restated existing law.[4] The principle that misjoinder deprives the accused of "a substantial right" and therefore is "revisable on error" thus remained the law when the Federal Rules of Criminal Procedure became effective in 1946.

Furthermore, if one reads Rule 8 in conjunction with Rule 14, it is immediately apparent that the draftsmen of the Rules regarded every violation of Rule 8 as inherently prejudicial. For Rule 14 authorizes the Court to grant a severance, even in the absence of a Rule 8 violation, if either the defendant or the Government is prejudiced by a joinder of offenses or defendants.[5] Thus, it seems clear that the draftsmen of the Rules regarded violations of Rule 8 as inherently prejudicial, and recognized that even joinders that were not prohibited by the Rule should be forbidden if a party

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[3] See 5 Federal Rules of Criminal Procedure: Documentary History, Second Preliminary Draft, Feb. 1944, Note to Rule 8, pp. 35–36 ("Since the counts of two or more indictments consolidated for trial, under 18 U. S. C. § 557, are 'put . . . in the same category as if they were separate counts in one indictment,' *McElroy* v. *United States*, 164 U. S. 76, 77 (1896), this type of joinder is more widely practiced than is generally realized").

[4] See Maguire, Proposed New Federal Rules of Criminal Procedure, 23 Ore. L. Rev. 56, 59 (1943) ("Subdivision (b) of Rule 9 provides for a joinder of defendants where they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting or resulting in an offense, and that they may be charged in one or more counts, together or separately, in any manner indicating their respective participation in the offense or offenses. . . . This rule merely restates the present Federal statute . . ."). "Rule 9" became the current "Rule 8" without substantial change. See Orfield, Joinder in Federal Criminal Procedure, 26 F. R. D. 23, 28–29 (1960).

[5] Rule 14 provides, in pertinent part: "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

could demonstrate actual prejudice. This is the way Professor Charles Wright interpreted the intent of the draftsmen in his 1969 treatise. He wrote:

> "Indeed there would be no point in having Rule 8 if the harmless error concept were held applicable to it. If that concept could be applied, then defendant could obtain reversal only if the joinder were prejudicial to him. But Rule 14 provides for relief from prejudicial joinder, and a defendant can obtain a reversal, in theory at least, if he has been prejudiced even though the joinder was proper. If misjoinder can be regarded as harmless error, then reversal could be had only for prejudice whether the initial joinder was proper or improper. If that were true, it would be pointless to define in Rule 8 the limits on joinder, since it would no longer be of significance whether those limits were complied with, and the draftsmen would have been better advised to allow unlimited joinder of offenses and defendants, subject to the power of the court to give relief if the joinder were prejudicial." 1 C. Wright, Federal Practice and Procedure, § 144, p. 329 (1969).[6]

Other commentators have agreed that the structure of the Federal Rules strongly supports the conclusion that the draftsmen viewed a violation of the misjoinder rule as inherently prejudicial.[7]

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[6] In his current edition, Professor Wright notes that a number of federal courts have held that misjoinder may be harmless error, but he concludes that "there remains much to be said for what was once the almost-unanimous view that misjoinder is never harmless error." 1 C. Wright, Federal Practice and Procedure: Criminal, § 145, p. 532 (2d ed. 1982).

[7] See Note, Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion, 6 Hofstra L. Rev. 533, 544, n. 65 (1978) ("Implicit in the assertion that rule 8 sets the limits of tolerable prejudice is the argument that if its purpose is not to set such limits there is no purpose in the rule. Rule 14 would vest all questions of joinder in the trial court. . . . As both rule 14 and rule 8 were included in the rules, rule 8 must have been intended to establish the outer bounds

Thus, a review of the state of the law of joinder at the time the Federal Rules of Criminal Procedure were adopted, of the Advisory Committee's intent to restate then-existing law, and of the text of the Rules themselves requires a conclusion that a Rule 8 misjoinder violation is an error that affects the substantial rights of the accused and therefore requires reversal of a conviction.

II

In addition to its unexplained reference to the adoption of Rule 8, the Court suggests that its new misjoinder rule—that prejudice must be shown to justify reversal of a Rule 8 misjoinder error—is supported by its interpretation of developments in the law of "harmless-error." Specifically, the Court observes that the *McElroy* approach has been undermined by the passage of a harmless-error statute and rule, *ante*, at 444, and by the development of a harmless-error doctrine for constitutional errors, *ante*, at 445. Although the majority does not distinguish between these two categories, they require separate analysis. Neither category, however, remotely supports the majority's bald assertion that misjoinder should not be viewed as affecting "substantial rights," and thus not be viewed as inherently prejudicial.

The majority refers to the current harmless-error statute, 28 U. S. C. § 2111, and to Rule 52(a). As the majority points out, both define harmless error in terms of whether a violation affects "substantial rights."[8] Since this Court had already made clear that misjoinder affected "substantial

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within which the trial court has discretionary power under rule 14"). In my view, the majority's discussion of this issue, *ante*, at 449–450, n. 12, fails to answer this straightforward reading of Rule 8 and Rule 14.

[8] See 28 U. S. C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties"); Fed. Rule Crim. Proc. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded").

rights," *McElroy*, 164 U. S. 76 (1896), it is curious that the majority concludes, with no support at all, that the passage of a statute and Rule which allowed for correction of errors that did not affect "substantial rights" somehow changed the legal status of a violation that had been described in precisely those words. This view is especially curious when it is remembered that the Rule governing joinder was viewed by the draftsmen as a restatement of existing law.

To be sure, *McElroy* was decided before the first harmless-error statute was passed in 1919. That statute, a reaction to the hypertechnicality that had developed in American jurisprudence, did mark a significant change in our system's view of the effect of error.[9] But it is a long leap from that recognition to a view that the passage of the harmless-error statute in 1919—and the subsequent adoption of Rule 52(a) in 1946 and the passage of the current harmless-error statute in 1949—summarily jettisoned all prior jurisprudence on the errors that affected "substantial rights." Indeed, interpretations of the 1919 statute accorded it a very different mission. As Justice Frankfurter explained in refusing to require a showing of prejudice to justify reversal for a statutory violation: "Suffice it to indicate, what every student of the history behind the Act of February 26, 1919, knows, that that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict." *Bruno* v. *United States*, 308 U. S. 287, 294 (1939). And, while Rule 52(a) and the 1949 harmless-error statute were changed in a way that some commentators have found significant,[10] the

[9] For a discussion of the background of the 1919 statute, see *Kotteakos* v. *United States*, 328 U. S. 750, 758–760 (1946).

[10] The 1919 statute referred to "*technical* errors, defects, or exceptions which do not affect the substantial rights of the parties." 40 Stat. 1181, 28 U. S. C. § 391 (1946 ed.) (emphasis added). Rule 52(a) referred to "[a]ny error, defect, irregularity or variance which does not affect substantial rights"; the 1949 statute referred to "errors or defects which do not affect the substantial rights of the parties." 28 U. S. C. § 2111. See Note, 6

continuation of "substantial rights" as the benchmark for assessing the harmlessness of error provides no support for the proposition that anyone intended to change something that had been found to affect a "substantial right" into something that did not affect a substantial right.

Thus, neither the harmless-error statute, passed within a few years of the adoption of Rule 8, nor Rule 52(a), adopted at the same time as Rule 8, changed the interpretation of the misjoinder rule reflected in Rule 8.

The harmless-error statute and Rule are, however, at least relevant to the inquiry at hand. In contrast, the majority's reliance on *Chapman* v. *California*, 386 U. S. 18 (1967), *ante*, at 445, is plainly misplaced. The majority observes: "Clearly, *Chapman* and *Hasting* dictate that the harmless-error rule governs here." *Ante*, at 446. Nothing could be less clear. This case does not involve a claim of constitutional error. The harmless-error doctrine that was enunciated in *Chapman* thus does not settle the issue raised by this case. Simply because constitutional errors may be subject to a harmless-error inquiry does not mean that all nonconstitutional errors must be subject to harmless-error analysis, and this Court has never so held.[11] Rather, our mission in

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Hofstra L. Rev., *supra* n. 7, at 540 (discussing possible significance of change). But cf. H. R. Rep. No. 352, 81st Cong., 1st Sess., 18 (1949) (new harmless-error statute intended to "incorporate" former harmless-error statute); Rule 52(a), Notes of Advisory Commitee on Rules, 18 U. S. C. App., p. 657 (Rule intended as "a restatement of existing law"); *Kotteakos*, 328 U. S., at 757, n. 9 (citing Advisory Committee comment that Rule 52(a) was intended as "'a restatement of existing law'").

[11] That the Court has recognized the difference between constitutional and nonconstitutional harmless-error inquiries is reflected in the considerable difference in the Court's standards on these two subjects. Compare *Chapman*, 386 U. S., at 24 ("before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"), with *Kotteakos* v. *United States*, 328 U. S., at 765 (in nonconstitutional cases, "[t]he inquiry . . . is . . . whether the error itself had substantial influence"). To the extent that the majority ultimately cites the *Kotteakos* standard as governing this case, *ante*, at

reviewing nonconstitutional errors is, first, to discern whether the rule or statute which is being violated was intended to be subject to harmless-error analysis. If there is a definitive answer to that question, our inquiry should be at an end.[12] If there is no definitive answer, then we must try to assess the rule or statute in question in light of the purpose of the harmless-error rule and statute. We should not, however, rewrite existing law by adopting a presumption that, simply because a violation is nonconstitutional, it is automatically subject to harmless-error inquiry.

As the majority observes, the Court's willingness to invoke the harmless-error doctrine has expanded dramatically in recent years. This expansion is a source of considerable concern,[13] particularly because the Court has often been unclear and imprecise in its increasingly frequent invocation of harm-

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449, it is consistent with this distinction in our case law; to the extent that the majority suggests that *Chapman* controls the outcome of this case, however, *ante*, at 446, it reveals confusion about this distinction.

[12] Cf. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress").

[13] See Comment, Harmless Error: Abettor of Courtroom Misconduct, 74 J. Crim. L. & C. 457, 475 (1983) ("The harmless error standards as currently applied in review of criminal trials are eroding the integrity of the criminal justice system by encouraging violations of longstanding trial rules"); Goldberg, Harmless Error: Constitutional Sneak Thief, 71 J. Crim. L. & C. 421, 422 (1980) ("the doctrine of harmless constitutional error destroys important constitutional and institutional values"); Note, Harmful Use of Harmless Error in Criminal Cases, 64 Cornell L. Rev. 538, 540 (1979) ("increased use of harmless error analysis is inherently dangerous regardless of whether the errors violate the Constitution, statutes, or the common law") (footnotes omitted); Cameron & Osborn, When Harmless Error Isn't Harmless, 1971 Law & Social Order 23, 42 ("while the harmless error doctrine is an extremely useful device . . . it is not one that is without its dangers"). Cf. *United States* v. *Jackson*, 429 F. 2d 1368, 1373 (CA7 1970) (Clark, J., sitting by designation) ("'Harmless error' is swarming around the 7th Circuit like bees. . . . [T]he courts may have to act to correct a presently alarming situation").

less error.[14] In my view, harmless-error analysis is inappropriate in at least three situations: (1) when it is clear that a statute or Rule was not intended to be subject to such a rule; (2) when an independent value besides reliability of the outcome suggests that such analysis is inappropriate;[15] and (3) when the harmlessness of an error cannot be measured with precision.[16] In my view, misjoinder clearly falls into the first

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[14] See Field, Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale, 125 U. Pa. L. Rev. 15, 32 (1976) ("In sum, the case law on the content of the harmless error standard is less than lucid. There is some indication that Supreme Court opinions slip back and forth from one suggested standard to another, without explicit notice of the change, though the change could produce different results in many cases"); Saltzburg, The Harm of Harmless Error, 59 Va. L. Rev. 988 (1973) ("Chaos surrounds the standard for appellate review of errors in criminal proceedings"); Mause, Harmless Constitutional Error: The Implications of Chapman v. California, 53 Minn. L. Rev. 519, 557 (1969) ("the Court, if only in an effort to further the interest of net judicial economy, should attempt to delineate certain well-defined classes of constitutional error which require automatic reversal").

[15] In the constitutional area, the Court has made clear that certain independent values render a harmless-error analysis inappropriate. See, *e. g.*, *Rose* v. *Mitchell*, 443 U. S. 545 (1979) (racial discrimination in the selection of a grand jury is not subject to harmless-error analysis); *Chapman*, 386 U. S., at 23 ("there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error"). Cf. *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (STEVENS, J., dissenting) (some constitutional errors "are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained").

[16] In *Holloway* v. *Arkansas*, 435 U. S. 475, 491 (1978), CHIEF JUSTICE BURGER explained that harmless error was inappropriate in assessing the constitutional error of inappropriate joint representation in part because such an inquiry required "unguided speculation." See also Note, 64 Cornell L. Rev., *supra* n. 13, at 563–564 ("*Holloway*'s rationale naturally extends beyond the sixth amendment: it suggests that a rule of automatic reversal should apply to those fundamental, pervasive errors that have uncertain prejudicial impact. . . . The rule of automatic reversal should be extended to all errors, whether or not pervasive or constitutional, that result in unascertainable prejudice") (footnotes omitted).

category. It also has elements of the second and third. Misjoinder implicates the independent value of individual responsibility and our deep abhorrence of the notion of "guilt by association." Our criminal justice system has expanded considerably in its tolerance of multiple joinders and massive conspiracy trials. The rule against misjoinder remains, however, as an ultimate safeguard of our cherished principle that one is tried for one's own deeds, and not for another's.[17] The harmfulness of misjoinder is also the type of error that has consequences that are difficult to measure with precision.[18] These concerns may or may not outweigh the societal interests that motivate the Court today, but they are surely strong enough to demonstrate that the draftsmen of the Federal Rules acted responsibly when they adhered to the time-honored rule of the *McElroy* case. The misjoinder Rule that they crafted is clear, and should be respected.[19] Misjoinder affects "substantial rights," and should lead to reversal.

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[17] Cf. *Krulewitch* v. *United States*, 336 U. S. 440, 457–458 (1949) (Jackson, J., concurring) ("Few instruments of injustice can equal that of implied or presumed or constructive crimes. The most odious of all oppressions are those which mask as justice").

[18] See Note, 6 Hofstra L. Rev., *supra* n. 7, at 563 (harmless error "is inaccurate as a test for ascertaining the prejudice resulting from misjoinder because of the impossibility of determining the extent of that prejudice").

[19] The majority's suggestion that two Supreme Court opinions have held misjoinder subject to the harmless-error rule is erroneous. The majority writes: "A holding directly involving misjoinder again indicated the harmless-error rule should apply." *Ante*, at 447. The decision cited by the majority for this proposition, *Schaffer* v. *United States*, 362 U. S. 511 (1960), explicitly found no Rule 8 error and explicitly disavowed the type of "indication" claimed by the majority. See 362 U. S., at 517 ("The harmless-error rule, which was the central issue in *Kotteakos*, is not even reached in the instant case, since here the joinder was proper under Rule 8(b) and no error was shown"). Thus, the majority's discussion of *Schaffer*, *ante*, at 447–448, is completely beside the point. Indeed, one year after *Schaffer* was decided, it was read to support, not the majority's conclusion, but the viability of the *McElroy* rule. See *Ward* v. *United States*, 110 U. S. App. D. C. 136, 137, 289 F. 2d 877, 878 (1961) (Burger,

III

Undertaking a harmless-error analysis is perhaps the least useful function that this Court can perform, cf. *United States* v. *Hasting*, 461 U. S. 499, 516–518 (1983) (STEVENS, J., concurring in judgment). For that reason, a decision that a harmless-error inquiry is required should lead to a remand to the Court of Appeals, which is in a far better position than we are to study the complete trial record with care. The majority's opinion in this case confirms the general advisability of that approach.

The Court's conclusion that Dennis Lane suffered no prejudice is based on three cursory observations. First, the Court asserts, with no explanation, that there was "overwhelming evidence" of his guilt. *Ante*, at 450. There are at least two problems with this observation. The first is that the majority fails to appreciate the *Kotteakos* recognition that the harmless-error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry.[20] The second is that,

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J.) (citing *Schaffer* and *McElroy* to reject Government suggestion that defendant must show prejudice to obtain reversal after misjoinder of defendants has been established).

Similarly, the majority's claim that *Kotteakos* "suggested that the harmless-error rule could similarly apply" to misjoinder, *ante*, at 447, vastly overstates the case. The Court noted that a possible joinder violation gave added weight to its conclusion that the error before it was *not* harmless. 328 U. S., at 774–775. The Court observed that "§ 269 [the harmless-error statute] carries the threat of overriding the requirement of § 557 for substituting separate counts in the place of separate indictments, unless the application of § 269 is made with restraint. The two sections must be construed and applied so as to bring them into substantial harmony, not into square conflict." *Id.*, at 775. This expression of concern about the possible effect of harmless error on misjoinder, however, hardly supports the notion that *Kotteakos* held misjoinder subject to harmless-error analysis. And, despite the majority's view that its holding is the only way to bring harmless error and misjoinder into "substantial harmony," *ante*, at 449, a conclusion that misjoinder necessarily affects substantial rights produces the same harmony.

[20] In *Kotteakos*, the Court accepted the defendants' concession that the evidence was not "insufficient, if considered apart from the alleged errors

even if it were faithfully applying the *Kotteakos* distinction between sufficiency of the evidence and harmless error, the majority utterly fails to explain its statement about "overwhelming evidence." A reading of *Kotteakos* reveals that only the most painstaking and thorough review of an entire trial record can justify a conclusion that its standard has, or has not, been met. The opinion the Court announces today contains no indication that it has made that kind of analysis of the case against Dennis Lane.[21]

Second, the Court notes that the jury was properly instructed to evaluate the evidence under each count and against each defendant separately. Since that instruction should be given routinely in every case in which there is a joinder of defendants or offenses, it surely cannot be regarded as an adequate response to a claim that a misjoinder was prejudicial.[22]

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relating to the proof and the instructions at the trial." 328 U. S., at 753. The Court went on to emphasize that the harmless-error analysis is fundamentally different from the sufficiency analysis. "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.*, at 765. Even though the evidence was concededly sufficient without the errors, the Court thus found the errors not harmless, and the convictions reversible. The majority quotes the relevant passage from *Kotteakos*, *ante*, at 449, but fails to reflect its principle in its analysis.

[21] The only specific evidence even mentioned by the majority—the testimony of Heard and Lankford, *ante*, at 450–451, n. 13—represents accomplice testimony. Such testimony is, of course, generally recognized as posing special evidentiary problems. See, *e. g.*, 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 107 [04], pp. 107–50—107–51 (1985); 3 S. Gard, Jones on Evidence § 20:60, pp. 736–737 (6th ed. 1972).

[22] Indeed, in the year following *Kotteakos*, this Court made clear that proper jury instructions might not alleviate the problems inherent in joint trials:

"The grave danger in this case, if any, arose not from the trial court's rulings upon admissibility or from its instructions to the jury. As we have said, these were as adequate as might reasonably be required in a joint trial. The danger rested rather in the risk that the jury, in disregard of

Finally, the Court rather hesitantly suggests that the evidence on Count 1 "would likely have been admissible" in a joint retrial on Counts 2–6, *ante*, at 450. The Court thus assumes that a joint retrial is inevitable. Of course, if misjoinder is found only as to Dennis Lane, as I suggest below, then the majority's point collapses. In any event, nothing in *Kotteakos* or in our harmless-error precedents suggests that this Court should find an error harmless because of the Court's completely untested speculations about a possible future retrial. Not surprisingly, *Kotteakos* suggests precisely the opposite.[23]

A determination that an error was harmless is an extremely weighty conclusion; it implicates profound notions of fairness and justice.[24] Even if the majority is correct that Rule 8 misjoinder should be subject to harmless-error analysis, I am convinced that the majority's summary finding of harmless error in this case fails to give the issue the attention it deserves.[25]

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the court's direction, would transfer, consciously or unconsciously, the effect of the excluded admissions from the case as made against Goldsmith and Weiss across the barrier of the exclusion to the other three defendants." *Blumenthal* v. *United States*, 332 U. S. 539, 559 (1947).

[23] "The Government's theory seems to be, in ultimate logical reach, that the error presented by the variance is insubstantial and harmless, if the evidence offered specifically and properly to convict each defendant would be sufficient to sustain his conviction, if submitted in a separate trial. For reasons we have stated and in view of the authorities cited, this is not and cannot be the test under § 269 [the harmless error statute]." 328 U. S., at 767.

[24] See R. Traynor, The Riddle of Harmless Error 80 (1970) ("[T]he evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex. Each evaluation bears upon our traditional understanding that fair trial encompasses not only fair notice and an adequate opportunity to be heard before the appropriate tribunal, but also an orderly presentation of evidence and a rational application of the law thereto").

[25] A more searching review of the record might require the majority to confront certain troublesome aspects of this erroneous joinder. The majority might have to confront the fact that at least 9 of the Government's 26

IV

I agree with the Court's conclusion that the evidence was sufficient to sustain both convictions of mail fraud and therefore join Part III of its opinion. I also agree with the judgment insofar as it upholds the conviction of James Lane. It is perfectly clear that the violation of Rule 8(b)—the rule prohibiting the improper joinder of *defendants*—occasioned by the misjoinder of Count 1 did not affect James Lane because he was the defendant in Count 1. But since there is no claim that the son, Dennis Lane, took any part in Count 1 (the mail fraud regarding the 1979 El Toro Restaurant fire), I believe that his right not to be joined as a defendant in his father's trial for that felony was a "substantial right" that was adversely affected by the misjoinder.

In my view, the Court's opinion misconstrues the history and purpose of Rule 8, sows further confusion in the Court's

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witnesses—more than one third—addressed the El Toro fire, the offense for which Dennis Lane was not charged. See Testimony of Morris Loewenstern, Tr. 33–43; Testimony of Earl Simpson, *id.*, at 44–50; Testimony of Cindy Wright, *id.*, at 58–59; Testimony of David Lard, *id.*, at 62–89, 96–103; Testimony of Ben Shaw, *id.*, at 103–112; Testimony of Jack Stotts, *id.*, at 113–123; Testimony of Wayne Cox, *id.*, at 123–132; Testimony of Jay Messenger, *id.*, at 139–157; and Testimony of Sidney Heard, *id.*, at 230–243. It might have to confront the fact that two of the defense witnesses similarly focused on the El Toro fire. See Testimony of Janie Malone, *id.*, at 681–736; Testimony of Jess Maddox, *id.*, at 891–894. It might have to confront the fact that, in their closing arguments, both the Government and the defense counsel devoted considerable attention to the El Toro fire. See Government's closing argument, *id.*, at 989–993; defense's closing argument, *id.*, at 1008–1014. And it might, finally, have to confront the fact that the prosecutor's closing words to the jury were that "*each* of these charges has been proved against J. C. Lane *and Dennis Lane* beyond a reasonable doubt." *Id.*, at 1051 (emphasis added).

This is not to say that I have studied the record with sufficient care to conclude that, if misjoinder is subject to harmless-error analysis, the error here was not harmless. Rather, it is to say that I am convinced that the majority's opinion gives no indication of having wrestled with the complexities of the 1,000-page trial transcript in a manner that would permit its confident assertion that the error was harmless.

harmless-error jurisprudence, and fails to make the kind of harmless-error analysis that Rule 52(a) requires. Because I do not consider these errors harmless, I respectfully dissent from the judgment regarding Dennis Lane in No. 84–744.

WITTERS *v.* WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 84–1070. Argued November 6, 1985—Decided January 27, 1986

Petitioner, suffering from a progressive eye condition, applied to the Washington Commission for the Blind for vocational rehabilitation assistance pursuant to a Washington statute. At the time, he was attending a private Christian college seeking to become a pastor, missionary, or youth director. The Commission denied aid on the ground that it was prohibited by the State Constitution, and this ruling was upheld on administrative appeal. Petitioner then brought an action in State Superior Court, which affirmed the administrative ruling on the same state-law grounds. The Washington Supreme Court affirmed but based its ruling on the Establishment Clause of the First Amendment, holding that the provision of aid to petitioner would have the primary effect of advancing religion in violation of that Clause.

Held: On the record, extension of aid under the Washington vocational rehabilitation program to finance petitioner's training at the Christian college would not advance religion in a manner inconsistent with the Establishment Clause. Pp. 485–490.

(a) As far as the record shows, assistance provided under the Washington program is paid directly to the student, who then transmits it to the educational institution of his or her choice. The program is in no way skewed towards religion and creates no financial incentive for students who undertake sectarian education. Pp. 487–488.

(b) Moreover, nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education. P. 488.

(c) On the facts, it is inappropriate to view any aid ultimately flowing to the Christian college as resulting from a *state* action sponsoring or subsidizing religion. Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion. Pp. 488–489.

102 Wash. 2d 624, 689 P. 2d 53, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined, and in Parts I and III of which O'CONNOR, J.,

joined. WHITE, J., filed a concurring opinion, *post*, p. 490. POWELL, J., filed a concurring opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 490. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 493.

Michael P. Farris argued the cause and filed briefs for petitioner.

Timothy R. Malone, Assistant Attorney General of Washington, argued the cause for respondent. With him on the brief were *Kenneth O. Eikenberry*, Attorney General, *Philip H. Austin*, Senior Deputy Attorney General, and *David R. Minkel*, Assistant Attorney General.*

JUSTICE MARSHALL delivered the opinion of the Court.

The Washington Supreme Court ruled that the First Amendment precludes the State of Washington from extending assistance under a state vocational rehabilitation assistance program to a blind person studying at a Christian college and seeking to become a pastor, missionary, or youth director. Finding no such federal constitutional barrier on the record presented to us, we reverse and remand.

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Acting Solicitor General Fried, Acting Assistant Attorney General Willard, Michael C. McConnell, Anthony J. Steinmeyer*, and *Michael Jay Singer;* for the American Jewish Committee by *Samuel Rabinove* and *Richard T. Foltin;* for the American Jewish Congress by *Marc D. Stern* and *Ronald A. Krauss;* for the Christian Legal Society et al. by *Samual Eric Hans Ericsson, Kimberly Wood Colby*, and *Forest D. Montgomery;* for the Rutherford Institute et al. by *Larry L. Crain, Guy O. Farley, Jr., John W. Whitehead, James J. Knicely, Thomas O. Kotouc, Wendell R. Bird*, and *William B. Hollberg;* and for the National Legal Christian Foundation.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Charles B. Wiggins, Jack D. Novik, Charles S. Sims*, and *Burt Neuborne;* for Americans United for Separation of Church and State by *Lee Boothby* and *Walter E. Carson;* and for the Anti-Defamation League of B'nai B'rith et al. by *Ruti G. Teitel, Justin J. Finger, Jeffrey P. Sinensky*, and *Steven M. Freeman.*

I

Petitioner Larry Witters applied in 1979 to the Washington Commission for the Blind for vocational rehabilitation services pursuant to Wash. Rev. Code § 74.16.181 (1981).[1] That statute authorized the Commission, *inter alia*, to "[p]rovide for special education and/or training in the professions, business or trades" so as to "assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care." *Ibid.* Petitioner, suffering from a progressive eye condition, was eligible for vocational rehabilitation assistance under the terms of the statute.[2] He was at the time attending Inland Empire School of the Bible, a private Christian college in Spokane, Washington, and studying the Bible, ethics, speech, and church administration in order to equip himself for a career as a pastor, missionary, or youth director. App. 7–8.

The Commission denied petitioner aid. It relied on an earlier determination embodied in a Commission policy statement that "[t]he Washington State constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas," *id.*, at 4, and on its conclusion that petitioner's training was "religious

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[1] In 1983 the Washington Legislature repealed chapters 74.16 and 74.17 of the Code, enacting in their place a new chapter 74.18. The statutory revision abolished the Commission for the Blind and created respondent Department of Services for the Blind. See 1983 Wash. Laws, ch. 194, § 3. We shall refer to respondent for purposes of this opinion as "the Commission."

[2] Washington Rev. Code, ch. 74.18, see n. 1, *supra*, establishes a requirement that aid recipients be persons who "(1) have no vision or limited vision which constitutes or results in a substantial handicap to employment and (2) can reasonably be expected to benefit from vocational rehabilitation services in terms of employability." Wash. Rev. Code § 74.18.130 (1983) (effective June 30, 1983). It has not been established whether petitioner is eligible for aid under the new standard. That determination, however, will have no effect on any claim asserted by petitioner for reimbursement of aid withheld beginning in 1979.

instruction" subject to that ban. *Id.*, at 1. That ruling was affirmed by a state hearings examiner, who held that the Commission was precluded from funding petitioner's training "in light of the State Constitution's prohibition against the state directly or indirectly supporting a religion." App. to Pet. for Cert. F–6. The hearings examiner cited Wash. Const., Art. I, § 11, providing in part that "no public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment," and Wash. Const., Art. IX, § 4, providing that "[a]ll schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." App. to Pet. for Cert. F–4. That ruling, in turn, was upheld on internal administrative appeal.

Petitioner then instituted an action in State Superior Court for review of the administrative decision; the court affirmed on the same state-law grounds cited by the agency. The State Supreme Court affirmed as well. *Witters* v. *Commission for the Blind*, 102 Wash. 2d 624, 689 P. 2d 53 (1984). The Supreme Court, however, declined to ground its ruling on the Washington Constitution. Instead, it explicitly reserved judgment on the state constitutional issue and chose to base its ruling on the Establishment Clause of the Federal Constitution. The court stated:

> "The Supreme Court has developed a 3-part test for determining the constitutionality of state aid under the establishment clause of the First Amendment. 'First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion."' *Lemon* v. *Kurtzman*, [403 U. S. 602, 612–613 (1971)]. To withstand attack under the establishment clause, the challenged state action

must satisfy each of the three criteria." *Id.*, at 627–628, 689 P. 2d, at 55.

The Washington court had no difficulty finding the "secular purpose" prong of that test satisfied. Applying the second prong, however, that of "principal or primary effect," the court held that "[t]he provision of financial assistance by the State to enable someone to become a pastor, missionary, or church youth director clearly has the primary effect of advancing religion." *Id.*, at 629, 689 P. 2d, at 56. The court, therefore, held that provision of aid to petitioner would contravene the Federal Constitution. In light of that ruling, the court saw no need to reach the "entanglement" prong; it stated that the record was in any case inadequate for such an inquiry.

We granted certiorari, 471 U. S. 1002 (1985), and we now reverse.

II

The Establishment Clause of the First Amendment has consistently presented this Court with difficult questions of interpretation and application. We acknowledged in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), that "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Id.*, at 612, quoted in *Mueller* v. *Allen*, 463 U. S. 388, 393 (1983). Nonetheless, the Court's opinions in this area have at least clarified "the broad contours of our inquiry," *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U. S. 756, 761 (1973), and are sufficient to dispose of this case.

We are guided, as was the court below, by the three-part test set out by this Court in *Lemon* and quoted *supra*, at 484–485. See *Grand Rapids School District* v. *Ball*, 473 U. S. 373, 382–383 (1985). Our analysis relating to the first prong of that test is simple: all parties concede the unmistakably secular purpose of the Washington program. That program was designed to promote the well-being of the visually handicapped through the provision of vocational rehabilita-

tion services, and no more than a minuscule amount of the aid awarded under the program is likely to flow to religious education. No party suggests that the State's "actual purpose" in creating the program was to endorse religion, *Wallace* v. *Jaffree*, 472 U. S. 38, 74 (1985), quoting *Lynch* v. *Donnelly*, 465 U. S. 668, 690 (1984) (O'CONNOR, J., concurring), or that the secular purpose articulated by the legislature is merely "sham." *Wallace*, *supra*, at 64 (POWELL, J., concurring).

The answer to the question posed by the second prong of the *Lemon* test is more difficult. We conclude, however, that extension of aid to petitioner is not barred on that ground either.[3] It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its em-

[3] Respondent offers extensive argument before this Court relating to the practical workings of the state vocational assistance program. Focusing on the asserted practical "nature and operation of that program," Brief for Respondent 6, respondent asserts that the nature of the program in fact leads to an impermissible "symbolic union" of governmental and religious functions, "requir[ing] government choices at every step of the rehabilitation process" and "intertwining . . . governmental decisionmaking . . . with decisionmaking by church and school authorities." *Id.*, at 20. Respondent contends that the program therefore violates the second and third prongs of the *Lemon* test in a way that "hands off" aid, such as that provided pursuant to the GI Bill, does not. *Id.*, at 11.

This argument, however, was not presented to the state courts, and appears to rest in large part on facts not part of the record before us. Because this Court must affirm or reverse upon the case as it appears in the record, *Russell* v. *Southard*, 12 How. 139, 159 (1851); see also *New Haven Inclusion Cases*, 399 U. S. 392, 450, n. 66 (1970), we have no occasion to consider the argument here. Nor is it appropriate, as a matter of good judicial administration, for us to consider claims that have not been the subject of factual development in earlier proceedings. On remand, it will be up to the Washington Supreme Court as a matter of state procedural law whether and to what extent it should reopen the record for the introduction of evidence on the issues raised for the first time in this Court.

ployees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary. It is equally well settled, on the other hand, that the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is "that of a direct subsidy to the religious school" from the State. *Grand Rapids School District* v. *Ball*, 473 U. S., at 394. Aid may have that effect even though it takes the form of aid to students or parents. *Ibid.*; see, *e. g.*, *Wolman* v. *Walter*, 433 U. S. 229, 248–251 (1977); *Committee for Public Education and Religious Liberty* v. *Nyquist*, *supra*; *Sloan* v. *Lemon*, 413 U. S. 825 (1973). The question presented is whether, on the facts as they appear in the record before us, extension of aid to petitioner and the use of that aid by petitioner to support his religious education is a permissible transfer similar to the hypothetical salary donation described above, or is an impermissible "direct subsidy."

Certain aspects of Washington's program are central to our inquiry. As far as the record shows, vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice. Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.[4] Washington's program is "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited," *Committee for Public Education and Religious*

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[4] This is not the case described in *Grand Rapids School District* v. *Ball*, 473 U. S. 373, 396 (1985) ("Where . . . no meaningful distinction can be made between aid to the student and aid to the school, 'the concept of a loan to individuals is a transparent fiction'"), quoting *Wolman* v. *Walter*, 433 U. S. 229, 264 (1977) (opinion of POWELL, J.); see also *Wolman*, *supra*, at 250.

Liberty v. *Nyquist*, 413 U. S., at 782–783, n. 38, and is in no way skewed towards religion. It is not one of "the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court," *id.*, at 785. It creates no financial incentive for students to undertake sectarian education, see *id.*, at 785–786. It does not tend to provide greater or broader benefits for recipients who apply their aid to religious education, nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions. On the contrary, aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian. In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.

Further, and importantly, nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education. The function of the Washington program is hardly "to provide desired financial support for nonpublic, sectarian institutions." *Id.*, at 783; see *Sloan* v. *Lemon*, *supra;* cf. *Meek* v. *Pittenger*, 421 U. S. 349, 363–364 (1975). The program, providing vocational assistance to the visually handicapped, does not seem well suited to serve as the vehicle for such a subsidy. No evidence has been presented indicating that any other person has ever sought to finance religious education or activity pursuant to the State's program. The combination of these factors, we think, makes the link between the State and the school petitioner wishes to attend a highly attenuated one.

On the facts we have set out, it does not seem appropriate to view any aid ultimately flowing to the Inland Empire School of the Bible as resulting from a *state* action sponsoring or subsidizing religion. Nor does the mere circumstance

that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion. See *Lynch* v. *Donnelly*, 465 U. S., at 688 (O'CONNOR, J., concurring). Thus, while *amici* supporting respondent are correct in pointing out that aid to a religious institution unrestricted in its potential uses, if properly attributable to the State, is "clearly prohibited under the Establishment Clause," *Grand Rapids*, *supra*, at 395, because it may subsidize the religious functions of that institution, that observation is not apposite to this case. On the facts present here, we think the Washington program works no state support of religion prohibited by the Establishment Clause.[5]

III

We therefore reject the claim that, on the record presented, extension of aid under Washington's vocational rehabilitation program to finance petitioner's training at a Christian college to become a pastor, missionary, or youth director would advance religion in a manner inconsistent with the Establishment Clause of the First Amendment. On remand, the state court is of course free to consider the applicability of the "far stricter" dictates of the Washington State Constitution, see *Witters* v. *Commission for the Blind*, 102 Wash. 2d, at 626, 689 P. 2d, at 55. It may also choose to reopen the factual record in order to consider the arguments made by respondent and discussed in nn. 3 and 5, *supra*. We decline petitioner's invitation to leapfrog consideration of those issues by holding that the Free Exercise Clause *requires* Washington to extend vocational rehabilitation aid to petitioner regardless of what the State Constitution commands or further factual development reveals, and we ex-

[5] We decline to address the "entanglement" issue at this time. As a prudential matter, it would be inappropriate for us to address that question without the benefit of a decision on the issue below. Further, we have no reason to doubt the conclusion of the Washington Supreme Court that that analysis could be more fruitfully conducted on a more complete record.

press no opinion on that matter. See *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568 (1947).

The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE WHITE, concurring.

I remain convinced that the Court's decisions finding constitutional violations where a State provides aid to private schools or their students misconstrue the Establishment Clause and disserve the public interest. Even under the cases in which I was in dissent, however, I agree with the Court that the Washington Supreme Court erred in this case. Hence, I join the Court's opinion and judgment. At the same time, I agree with most of JUSTICE POWELL's concurring opinion with respect to the relevance of *Mueller* v. *Allen*, 463 U.S. 388 (1983), to this case.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring.

The Court's omission of *Mueller* v. *Allen*, 463 U. S. 388 (1983), from its analysis may mislead courts and litigants by suggesting that *Mueller* is somehow inapplicable to cases such as this one.[1] I write separately to emphasize that *Mueller* strongly supports the result we reach today.

As the Court states, the central question in this case is whether Washington's provision of aid to handicapped students has the "principal or primary effect" of advancing religion. *Lemon* v. *Kurtzman*, 403 U. S. 602, 612 (1971). See also *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U. S. 756, 783–785, n. 39 (1973). *Mueller* makes the answer clear: state programs that are wholly

[1] The Court offers no explanation for omitting *Mueller* from its substantive discussion. Indeed, save for a single citation on a phrase with no substantive import whatever, *ante*, at 485, *Mueller* is not even mentioned.

neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon* v. *Kurtzman* test,[2] because any aid to religion results from the private choices of individual beneficiaries. *Mueller*, 463 U. S., at 398–399. Thus, in *Mueller*, we sustained a tax deduction for certain educational expenses, even though the great majority of beneficiaries were parents of children attending sectarian schools. *Id.*, at 401. We noted the State's traditionally broad taxing authority, *id.*, at 396, but the decision rested principally on two other factors. First, the deduction was equally available to parents of public school children and parents of children attending private schools. *Id.*, at 397; see *Nyquist*, *supra*, at 782–783, n. 38. Second, any benefit to religion resulted from the "numerous private choices of individual parents of school-age children." *Mueller*, *supra*, at 399.

The state program at issue here provides aid to handicapped students when their studies are likely to lead to employment. Aid does not depend on whether the student wishes to attend a public university or a private college, nor does it turn on whether the student seeks training for a religious or a secular career. It follows that under *Mueller* the State's program does not have the "principal or primary effect" of advancing religion.[3]

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[2] Cf. *Sloan* v. *Lemon*, 413 U. S. 825, 832 (1973):

"The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions."

[3] Contrary to the Court's suggestion, see *ante*, at 488, this conclusion does not depend on the fact that petitioner appears to be the only handicapped student who has sought to use his assistance to pursue religious training. Over 90% of the tax benefits in *Mueller* ultimately flowed to religious institutions. Compare *Mueller* v. *Allen*, 463 U. S., at 401, with *id.*, at 405 (MARSHALL, J., dissenting). Nevertheless, the aid was thus

The Washington Supreme Court reached a different conclusion because it found that the program had the practical effect of aiding religion *in this particular case*. *Witters* v. *Commission for the Blind*, 102 Wash. 2d 624, 628–629, 689 P. 2d 53, 56 (1984). In effect, the court analyzed the case as if the Washington Legislature had passed a private bill that awarded petitioner free tuition to pursue religious studies.

Such an analysis conflicts with both common sense and established precedent.[4] Nowhere in *Mueller* did we analyze the effect of Minnesota's tax deduction on the parents who were parties to the case; rather, we looked to the nature and consequences of the program *viewed as a whole*. *Mueller*, *supra*, at 397–400. The same is true of our evaluation of the tuition reimbursement programs at issue in *Nyquist*, *supra*, at 780–789, and *Sloan* v. *Lemon*, 413 U. S. 825, 830–832 (1973). See also *Board of Education* v. *Allen*, 392 U. S. 236, 243–244, 248 (1968); *Everson* v. *Board of Education*, 330 U. S. 1, 16–17 (1947). This is the appropriate perspective for this case as well. Viewed in the proper light, the Washington program easily satisfies the second prong of the *Lemon* test.

I agree, for the reasons stated by the Court, that the State's program has a secular purpose, and that no entanglement challenge is properly raised on this record. I therefore join the Court's judgment. On the understanding that nothing we do today lessens the authority of our decision in *Mueller*, I join the Court's opinion as well.

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channeled by individual parents and not by the State, making the tax deduction permissible under the "primary effect" test of *Lemon*.

[4] Under the Washington Supreme Court's approach, the government could never provide aid of any sort to one who would use it for religious purposes, no matter what the characteristics of the challenged program. This Court has never taken such an approach. See *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970); *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947).

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I join Parts I and III of the Court's opinion, and concur in the judgment. I also agree with the Court that both the purpose and effect of Washington's program of aid to handicapped students are secular. As JUSTICE POWELL's separate opinion persuasively argues, the Court's opinion in *Mueller* v. *Allen*, 463 U. S. 388 (1983), makes clear that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon* v. *Kurtzman* test, because any aid to religion results from the private decisions of beneficiaries." *Ante*, at 490–491 (POWELL, J., concurring) (footnote omitted). The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief. See *Lynch* v. *Donnelly*, 465 U. S. 668, 690 (1984) (O'CONNOR, J., concurring).

MIDLANTIC NATIONAL BANK *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84–801. Argued October 16, 1985—Decided January 27, 1986*

Quanta Resources Corp. (Quanta) processed waste oil at facilities located in New York and New Jersey. The New Jersey Department of Environmental Protection (NJDEP) discovered that Quanta had violated a provision of the operating permit for the New Jersey facility by accepting oil contaminated with a toxic carcinogen. During negotiations with NJDEP for the cleanup of the New Jersey site, Quanta filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, and after NJDEP had issued an order requiring cleanup, Quanta converted the action to a liquidation proceeding under Chapter 7. An investigation of the New York facility then revealed that Quanta had also accepted similarly contaminated oil at that site. The trustee notified the creditors and the Bankruptcy Court that he intended to abandon the property under § 554(a) of the Bankruptcy Code, which authorizes a trustee to "abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate." The City and the State of New York objected, contending that abandonment would threaten the public's health and safety, and would violate state and federal environmental law. The Bankruptcy Court approved the abandonment, and, after the District Court affirmed, an appeal was taken to the Court of Appeals for the Third Circuit. Meanwhile, the Bankruptcy Court also approved the trustee's proposed abandonment of the New Jersey facility over NJDEP's objection, and NJDEP took a direct appeal to the Court of Appeals. In separate judgments, the Court of Appeals reversed, holding that the Bankruptcy Court erred in permitting abandonment.

Held: A trustee in bankruptcy may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards. Congress did not intend for § 554(a) to pre-empt all state and local laws. A bankruptcy court does not have the power to authorize an abandonment without formulat-

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*Together with No. 84–805, *O'Neill, Trustee in Bankruptcy of Quanta Resources Corp., Debtor* v. *City of New York et al.*, and *O'Neill, Trustee in Bankruptcy of Quanta Resources Corp., Debtor* v. *New Jersey Department of Environmental Protection*, also on certiorari to the same court.

ing conditions that will adequately protect the public's health and safety. Pp. 500–507.

(a) Before the 1978 revisions of the Bankruptcy Code, which codified in § 554 the judicially developed rule of abandonment, the trustee's abandonment power had been limited by a judicially developed doctrine intended to protect legitimate state and federal interests. In codifying the rule of abandonment, Congress also presumably included the corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws. Pp. 500–501.

(b) Neither this Court's decisions nor Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety. Where the Bankruptcy Code has conferred other special powers upon the trustee and where there was no common-law limitation on such powers, Congress has expressly provided that the trustee's efforts to marshal and distribute the estate's assets must yield to governmental interests in public health and safety. It cannot be assumed that Congress, having placed such limitations upon other aspects of trustees' operations, intended to discard the well-established judicial restriction on the abandonment power. Moreover, 28 U. S. C. § 959(b), which commands the trustee to "manage and operate the property in his possession . . . according to the requirements of the valid laws of the State," provides additional evidence that Congress did not intend for the Bankruptcy Code to pre-empt all state laws. Pp. 502–505.

(c) Additional support for restricting the abandonment power is found in repeated congressional emphasis, in other statutes, on the goal of protecting the environment against toxic pollution. Pp. 505–506.

739 F. 2d 912 and 739 F. 2d 927, affirmed.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE and O'CONNOR, JJ., joined, *post*, p. 507.

A. Dennis Terrell argued the cause for petitioner in No. 84–801. With him on the brief was *Kenneth S. Kasper*. *William F. McEnroe* argued the cause for petitioner in No. 84–805. With him on the brief was *Thomas J. O'Neill, pro se*.

Mary C. Jacobson, Deputy Attorney General of New Jersey, argued the cause for respondent in No. 84–801. With her on the brief were *Irwin I. Kimmelman*, Attorney Gen-

eral, *James J. Ciancia*, Assistant Attorney General, and *Richard F. Engel* and *Ross A. Lewin*, Deputy Attorneys General. *Robert Hermann*, Solicitor General of New York, argued the cause for respondents in No. 84–805. With him on the brief were *Robert Abrams*, Attorney General, *Nancy Stearns*, *Norman Spiegel*, and *Christopher Keith Hall*, Assistant Attorneys General, *Frederick A. O. Schwarz, Jr.*, and *Leonard Koerner*.*

JUSTICE POWELL delivered the opinion of the Court.

These petitions for certiorari, arising out of the same bankruptcy proceeding, present the question whether § 554(a) of the Bankruptcy Code, 11 U. S. C. § 554(a),[1] authorizes a trustee in bankruptcy to abandon property in contravention of state laws or regulations that are reasonably designed to protect the public's health or safety.

I

Quanta Resources Corporation (Quanta) processed waste oil at two facilities, one in Long Island City, New York, and

**Thomas H. Jackson, pro se*, filed a brief as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the United States by *Acting Solicitor General Fried*, *Assistant Attorney General Habicht*, *Deputy Solicitor General Claiborne*, *Kathryn A. Oberly*, and *Dirk D. Snel*; for the State of California by *John K. Van de Kamp*, Attorney General, *Theodora Berger*, Assistant Attorney General, and *Reed Sato*, *Lisa S. Trankley*, and *Craig C. Thompson*, Deputy Attorneys General; and for the State of West Virginia et al. by *Charlie Brown*, Attorney General of West Virginia, *Steven Johnston Knopp*, Assistant Attorney General, *James D. Morris*, and *Howard J. Wein*.

Ronald A. Zumbrun and *Robert K. Best* filed a brief for the Pacific Legal Foundation as *amicus curiae*.

[1] Section 554(a) reads:

"After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate."

Technical amendments in the Bankruptcy Amendments and Federal Judgeship Act of 1984 added the words "and benefit" after "value" in § 554(a). Pub. L. 98–353, Tit. III, § 468(a), 98 Stat. 380.

the other in Edgewater, New Jersey. At the Edgewater facility, Quanta handled the oil pursuant to a temporary operating permit issued by the New Jersey Department of Environmental Protection (NJDEP), respondent in No. 84–801. In June 1981, Midlantic National Bank, petitioner in No. 84–801, provided Quanta with a $600,000 loan secured by Quanta's inventory, accounts receivable, and certain equipment. The same month, NJDEP discovered that Quanta had violated a specific prohibition in its operating permit by accepting more than 400,000 gallons of oil contaminated with PCB, a highly toxic carcinogen. NJDEP ordered Quanta to cease operations at Edgewater, and the two began negotiations concerning the cleanup of the Edgewater site. But on October 6, 1981, before the conclusion of negotiations, Quanta filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. The next day, NJDEP issued an administrative order requiring Quanta to clean up the site. Quanta's financial condition remained perilous, however, and the following month, it converted the action to a liquidation proceeding under Chapter 7. Thomas J. O'Neill, petitioner in No. 84–805, was appointed trustee in bankruptcy, and subsequently oversaw abandonment of both facilities.

After Quanta filed for bankruptcy, an investigation of the Long Island City facility revealed that Quanta had accepted and stored there over 70,000 gallons of toxic, PCB-contaminated oil in deteriorating and leaking containers. Since the mortgages on that facility's real property exceeded the property's value, the estimated cost of disposing of the waste oil plainly rendered the property a net burden to the estate. After trying without success to sell the Long Island City property for the benefit of Quanta's creditors, the trustee notified the creditors and the Bankruptcy Court for the District of New Jersey that he intended to abandon the property pursuant to § 554(a). No party to the bankruptcy proceeding disputed the trustee's allegation that the site was "burdensome" and of "inconsequential value to the estate" within the meaning of § 554.

The City and the State of New York (collectively New York), respondents in No. 84–805, nevertheless objected, contending that abandonment would threaten the public's health and safety, and would violate state and federal environmental law. New York rested its objection on "public policy" considerations reflected in applicable local laws, and on the requirement of 28 U. S. C. § 959(b) that a trustee "manage and operate" the property of the estate "according to the requirements of the valid laws of the State in which such property is situated." New York asked the Bankruptcy Court to order that the assets of the estate be used to bring the facility into compliance with applicable law. After briefing and argument, the court approved the abandonment, noting that "[t]he City and State are in a better position in every respect than either the Trustee or debtor's creditors to do what needs to be done to protect the public against the dangers posed by the PCB-contaminated facility." The District Court for the District of New Jersey affirmed, and New York appealed to the Court of Appeals for the Third Circuit.

Upon abandonment, the trustee removed the 24-hour guard service and shut down the fire-suppression system. It became necessary for New York to decontaminate the facility, with the exception of the polluted subsoil, at a cost of about $2.5 million.[2]

On April 23, 1983, shortly after the District Court had approved abandonment of the New York site, the trustee gave notice of his intention to abandon the personal property at the Edgewater site, consisting principally of the contaminated oil. The Bankruptcy Court approved the abandonment on May 20, over NJDEP's objection that the estate had

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[2]The sole issue presented by these petitions is whether a trustee may abandon property under § 554 in contravention of local laws designed to protect the public's health and safety. New York is claiming reimbursement for its expenditures as an administrative expense. That question, however, like the question of the ultimate disposition of the property, is not before us.

sufficient funds to protect the public from the dangers posed by the hazardous waste.[3]

Because the abandonments of the New Jersey and New York facilities presented identical issues, the parties in the New Jersey litigation consented to NJDEP's taking a direct appeal from the Bankruptcy Court to the Court of Appeals pursuant to § 405(c)(1)(B) of the Bankruptcy Act of 1978.

A divided panel of the Court of Appeals for the Third Circuit reversed. *In re Quanta Resources Corp.*, 739 F. 2d 912 (1984); *In re Quanta Resources Corp.*, 739 F. 2d 927 (1984). Although the court found little guidance in the legislative history of § 554, it concluded that Congress had intended to codify the judge-made abandonment practice developed under the previous Bankruptcy Act. Under that law, where state law or general equitable principles protected certain public interests, those interests were not overridden by the judge-made abandonment power. The court also found evidence in other provisions of the Bankruptcy Code that Congress did not intend to pre-empt all state regulation, but only that grounded on policies outweighed by the relevant federal in-

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[3] The trustee was not required to take even relatively minor steps to reduce imminent danger, such as security fencing, drainage and diking repairs, sealing deteriorating tanks, and removing explosive agents. Moreover, the trustee's abandonment at both sites aggravated already existing dangers by halting security measures that prevented public entry, vandalism, and fire. Joint Appendix in No. 83-5142 (CA3), pp. 11-12 (affidavit of Richard Docyk, Deputy Chief Inspector for N. Y. City Fire Department); *id.*, at 26 (transcript of proceedings before DeVito, J.). The 470,000 gallons of highly toxic and carcinogenic waste oil in unguarded, deteriorating containers "present risks of explosion, fire, contamination of water supplies, destruction of natural resources, and injury, genetic damage, or death through personal contact." Brief for United States as *Amicus Curiae* 4, 23; see Joint Appendix, *supra*, at 17 (70,000 gallons at New York site); Appendix in No. 83-5730 (CA3), p. A7 (400,000 gallons at New Jersey site); *id.*, at A46 (deteriorating containers); Joint Appendix, *supra*, at 11 (deteriorating tanks); *id.*, at 26 (guard service); *id.*, at 12 (risk of fire); *id.*, at 11 (contamination of adjacent areas); *id.*, at 20 (health effects of exposure to PCBs and their derivatives).

terests. Accordingly, the Court of Appeals held that the Bankruptcy Court erred in permitting abandonment, and remanded both cases for further proceedings.[4]

We granted certiorari and consolidated these cases to determine whether the Court of Appeals properly construed § 554, 469 U. S. 1207 (1985). We now affirm.

II

Before the 1978 revisions of the Bankruptcy Code, the trustee's abandonment power had been limited by a judicially developed doctrine intended to protect legitimate state or federal interests. This was made clear by the few relevant cases. In *Ottenheimer* v. *Whitaker*, 198 F. 2d 289 (CA4 1952), the Court of Appeals concluded that a bankruptcy trustee, in liquidating the estate of a barge company, could not abandon several barges when the abandonment would have obstructed a navigable passage in violation of federal law. The court stated:

> "The judge-made [abandonment] rule must give way when it comes into conflict with a statute enacted in order to ensure the safety of navigation; for we are not dealing with a burden imposed upon the bankrupt or his property by contract, but a duty and a burden imposed upon an owner of vessels by an Act of Congress in the public interest." *Id.*, at 290.

In *In re Chicago Rapid Transit Co.*, 129 F. 2d 1 (CA7), cert. denied *sub nom. Chicago Junction R. Co.* v. *Sprague*, 317 U. S. 683 (1942), the Court of Appeals held that the trustee of a debtor transit company could not cease its opera-

[4] Judge Gibbons dissented, arguing that § 554 permits abandonment without any exception analogous to that provided to the automatic stay. The dissent further contended that the majority's interpretation of § 554 raised substantial questions under the Takings Clause by potentially destroying the interest of secured creditors, see *United States* v. *Security Industrial Bank*, 459 U. S. 70 (1982), and that the majority had failed to address the important underlying issue of the priority of the States' claims for reimbursement.

tion of a branch railway line when local law required continued operation. While the court did not forbid the trustee to abandon property (*i. e.*, to reject an unexpired lease), it conditioned his actions to ensure compliance with state law. Similarly, in *In re Lewis Jones, Inc.*, 1 BCD 277 (Bkrtcy Ct. ED Pa. 1974), the Bankruptcy Court invoked its equitable power to "safeguard the public interest" by requiring the debtor public utilities to seal underground steam lines before abandoning them.

Thus, when Congress enacted § 554, there were well-recognized restrictions on a trustee's abandonment power. In codifying the judicially developed rule of abandonment, Congress also presumably included the established corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws. The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 266–267 (1979). The Court has followed this rule with particular care in construing the scope of bankruptcy codifications. If Congress wishes to grant the trustee an extraordinary exemption from nonbankruptcy law, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." *Swarts* v. *Hammer*, 194 U. S. 441, 444 (1904); see *Palmer* v. *Massachusetts*, 308 U. S. 79, 85 (1939) ("If this old and familiar power of the states [over local railroad service] was withdrawn when Congress gave district courts bankruptcy powers over railroads, we ought to find language fitting for so drastic a change"). Although these cases do not define for us the exact contours of the trustee's abandonment power, they do make clear that this power was subject to certain restrictions when Congress enacted § 554(a).

III

Neither the Court nor Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety. As we held last Term when the State of Ohio sought compensation for cleaning the toxic waste site of a bankrupt corporation:

> "Finally, we do not question that anyone in possession of the site—whether it is [the debtor] or another in the event the receivership is liquidated and the trustee abandons the property, or a vendee from the receiver *or the bankruptcy trustee*—must comply with the environmental laws of the State of Ohio. Plainly, that person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions." *Ohio* v. *Kovacs*, 469 U. S. 274, 285 (1985) (emphasis added).

Congress has repeatedly expressed its legislative determination that the trustee is not to have *carte blanche* to ignore nonbankruptcy law. Where the Bankruptcy Code has conferred special powers upon the trustee and where there was no common-law limitation on that power, Congress has expressly provided that the efforts of the trustee to marshal and distribute the assets of the estate must yield to governmental interest in public health and safety. *Infra*, at 503–504. One cannot assume that Congress, having placed these limitations upon other aspects of trustees' operations, intended to discard a well-established judicial restriction on the abandonment power. As we held nearly two years ago in the context of the National Labor Relations Act, "the debtor-in-possession is not relieved of all obligations under the [Act] simply by filing a petition for bankruptcy." *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513, 534 (1984).

The automatic stay provision of the Bankruptcy Code, § 362(a),[5] has been described as "one of the fundamental debtor protections provided by the bankruptcy laws." S. Rep. No. 95–989, p. 54 (1978); H. R. Rep. No. 95–595, p. 340 (1977). Despite the importance of § 362(a) in preserving the debtor's estate, Congress has enacted several categories of exceptions to the stay that allow the Government to commence or continue legal proceedings. For example, § 362(b)(5) permits the Government to enforce "nonmonetary" judgments against a debtor's estate. It is clear from the legislative history that one of the purposes of this exception is to protect public health and safety:

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[5] Section 362(a) provides:

"(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U. S. C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—

"(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

"(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

"(3) any act to obtain possession of property of the estate or of property from the estate;

"(4) any act to create, perfect, or enforce any lien against property of the estate;

"(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

"(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

"(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

"(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor."

> "Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, *environmental protection*, consumer protection, *safety, or similar police or regulatory laws*, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." H. R. Rep. No. 95–595, *supra*, at 343 (emphasis added); S. Rep. No. 95–989, *supra*, at 52 (emphasis added).

Petitioners have suggested that the existence of an express exception to the automatic stay undermines the inference of a similar exception to the abandonment power: had Congress sought to restrict similarly the scope of § 554, it would have enacted similar limiting provisions. This argument, however, fails to acknowledge the differences between the predecessors of §§ 554 and 362. As we have noted, the exceptions to the judicially created abandonment power were firmly established. But in enacting § 362 in 1978, Congress significantly broadened the scope of the automatic stay, see 1 W. Norton, Bankruptcy Law and Practice § 20.03, pp. 5–6 (1981), an expansion that had begun only five years earlier with the adoption of the Bankruptcy Rules in 1973, see *id.*, § 20.02, at 4–5. Between 1973 and 1978, some courts had stretched the expanded automatic stay to foreclose States' efforts to enforce their antipollution laws,[6] and Congress wanted to overrule these interpretations in its 1978 revision. See H. R. Rep. No. 95–595, *supra*, at 174–175. In the face of the greatly increased scope of § 362, it was necessary for Congress to limit this new power expressly.

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[6] See, *e. g.*, *In re Hillsdale Foundry Co.*, 1 BCD 195 (Bkrtcy Ct. WD Mich. 1974) (action by Michigan Attorney General to enforce State's antipollution laws held subject to automatic stay). The House Report also referred to an unreported case from Texas where a stay prevented the State of Maine from closing down a debtor's plant that was polluting a river in violation of the State's environmental protection laws. H. R. Rep. No. 95–595, pp. 174–175 (1977).

Title 28 U. S. C. § 959(b)[7] provides additional evidence that Congress did not intend for the Bankruptcy Code to pre-empt all state laws. Section 959(b) commands the trustee to "manage and operate the property in his possession . . . according to the requirements of the valid laws of the State." Petitioners have contended that § 959(b) is relevant only when the trustee is actually operating the business of the debtor, and not when he is liquidating it. Even though § 959(b) does not directly apply to an abandonment under § 554(a) of the Bankruptcy Code—and therefore does not delimit the precise conditions on an abandonment—the section nevertheless supports our conclusion that Congress did not intend for the Bankruptcy Code to pre-empt all state laws that otherwise constrain the exercise of a trustee's powers.

IV

Although the reasons elaborated above suffice for us to conclude that Congress did not intend for the abandonment power to abrogate certain state and local laws, we find additional support for restricting that power in repeated congressional emphasis on its "goal of protecting the environment against toxic pollution." *Chemical Manufacturers Assn., Inc.* v. *Natural Resources Defense Council, Inc.*, 470 U. S. 116, 143 (1985). Congress has enacted a Resource Conservation and Recovery Act, 42 U. S. C. §§ 6901–6987, to regulate the treatment, storage, and disposal of hazardous wastes by monitoring wastes from their creation until after their permanent disposal. That Act authorizes the United States to seek judicial or administrative restraint of activities involv-

[7] Section 959(b) provides:

"Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."

ing hazardous wastes that "may present an imminent and substantial endangerment to health or the environment." 42 U. S. C. § 6973; see also S. Rep. No. 98–284, p. 58 (1983). Congress broadened the scope of the statute and tightened the regulatory restraints in 1984.[8] In the Comprehensive Environmental Response, Compensation, and Liability Act, as amended by Pub. L. 98–80, § 2(c)(2)(B), Congress established a fund to finance cleanup of some sites and required certain responsible parties to reimburse either the fund or the parties who paid for the cleanup. The Act also empowers the Federal Government to secure such relief as may be necessary to avert "imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance." 42 U. S. C. § 9606. In the face of Congress' undisputed concern over the risks of the improper storage and disposal of hazardous and toxic substances, we are unwilling to presume that by enactment of § 554(a), Congress implicitly overturned longstanding restrictions on the common-law abandonment power.

V

In the light of the Bankruptcy trustee's restricted pre-1978 abandonment power and the limited scope of other Bankruptcy Code provisions, we conclude that Congress did not intend for § 554(a) to pre-empt all state and local laws. The

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[8] Congress eliminated the small generator exception and subjected many more facilities to the regulations. Pub. L. 98–616, 98 Stat. 3221, 3248–3272 (codified at 42 U. S. C. § 6921(d) (1982 ed., Supp. III)). Another provision automatically broadens the Act's coverage by automatically assigning a hazardous rating to substances that the Environmental Protection Agency does not classify by a set deadline. 98 Stat. 3227–3231 (codified at 42 U. S. C. §§ 6924(d), (e), (f)(3), (g)(6) (1982 ed., Supp. III)). Amended enforcement provisions allow more citizen suits, 98 Stat. 3271–3272 (codified at 42 U. S. C. § 6973 (1982 ed., Supp. III)), and authorize administrative orders or suits to compel "corrective action" after a leak has occurred. 98 Stat. 3257–3258 (codified at 42 U. S. C. § 6928(h) (1982 ed., Supp. III)).

Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety. Accordingly, without reaching the question whether certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself, we hold that a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards.[9] Accordingly, we affirm the judgments of the Court of Appeals for the Third Circuit.

It is so ordered.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR join, dissenting.

The Court today concludes that Congress did not intend the abandonment provision of the Bankruptcy Code, 11 U. S. C. § 554(a), to pre-empt "certain state and local laws." In something of a surprise ending, the Court limits the class of laws that can prevent an otherwise authorized abandonment by a trustee to those "reasonably designed to protect the public health or safety from identified hazards." While this limitation reduces somewhat the scope of my disagreement with the result reached, it renders both the *ratio decidendi* and the import of the Court's opinion quite unclear. More important, I remain unconvinced by the Court's arguments supporting state power to bar abandonment. The principal and only independent ground offered—that Congress codified "well-recognized restrictions of a trustee's abandonment power"—is particularly unpersuasive. It rests on a misreading of three pre-Code cases, the elevation of that

[9] This exception to the abandonment power vested in the trustee by § 554 is a narrow one. It does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm.

misreading into a "well-recognized" exception to the abandonment power, and the unsupported assertion that Congress must have meant to codify the exception (or something like it). These specific shortcomings in the Court's analysis, which are addressed in greater detail below, stem at least in part from the Court's failure to discuss even in passing either the nature of abandonment or its role in federal bankruptcy.

Abandonment is "the release from the debtor's estate of property previously included in that estate." 2 W. Norton, Bankruptcy Law and Practice § 39.01 (1984), citing *Brown* v. *O'Keefe*, 300 U. S. 598, 602–603 (1937). Prior to enactment of the Bankruptcy Code in 1978, there was no statutory provision specifically authorizing abandonment in liquidation cases. By analogy to the trustee's statutory power to reject executory contracts, courts had developed a rule permitting the trustee to abandon property that was worthless or not expected to sell for a price sufficiently in excess of encumbrances to offset the costs of administration. 4 L. King, Collier on Bankruptcy ¶ 554.01 (15th ed. 1985) (hereinafter Collier).[1] This judge-made rule served the overriding purpose of bankruptcy liquidation: the expeditious reduction of the debtor's property to money, for equitable distribution to creditors, *Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, 227 (1930). 4 Collier ¶ 554.01. Forcing the trustee to administer burdensome property would contradict this purpose, slowing the administration of the estate and draining its assets.

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[1] Under the former Bankruptcy Act, title to the debtor's property vested in the trustee. Abandonment divested the trustee of title and revested it in the debtor. 4 Collier ¶ 554.02[2]. Under the Code, the trustee no longer takes title to the debtor's property, and he is simply divested of control over the property by the abandonment. *Ibid.* Although § 554 does not specify to whom the property is abandoned, the legislative history suggests that it is to the person having a possessory interest in the property. S. Rep. No. 95–989, p. 92 (1978); *Ohio* v. *Kovacs*, 469 U. S. 274, 284–285, n. 12 (1985).

The Bankruptcy Code expressly incorporates the power of abandonment into federal bankruptcy legislation for the first time. The relevant provision bears repeating:

> "(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate." 11 U. S. C. § 554(a) (amended 1984).

This language, absolute in its terms, suggests that a trustee's power to abandon is limited only by considerations of the property's value to the estate. It makes no mention of other factors to be balanced or weighed and permits no easy inference that Congress was concerned about state environmental regulations.[2] Indeed, as the Court notes, when Congress *was* so concerned it expressed itself clearly, specifically exempting some environmental injunctions from the automatic stay provisions of § 362 of the Code, 11 U. S. C. §§ 362(b)(4), (5) (1982 ed. and Supp. II). See *Ohio* v. *Kovacs*, 469 U. S. 274 (1985).

Nor does the scant legislative history of § 554 support the Court's interpretation. Nowhere does that legislative his-

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[2] Last Term in *Ohio* v. *Kovacs*, *supra*, which involved the dischargeability of certain environmental injunctions in bankruptcy, we briefly addressed the abandonment of hazardous waste sites:

"After notice and hearing, the trustee many abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate. 11 U. S. C. § 554. Such abandonment is to the person having the possessory interest in the property. S. Rep. No. 95–989, p. 92 (1978). . . . If the site at issue were [the debtor's] property, the trustee would shortly determine whether it was of value to the estate. If the property was worth more than the costs of bringing it into compliance with state law, the trustee would undoubtedly sell it for its net value, and the buyer would clean up the property, in which event whatever obligation [the debtor] might have had to clean up the property would have been satisfied. If the property were worth less than the cost of cleanup, the trustee would likely abandon it to its prior owner, who would have to comply with the state environmental law to the extent of his or its ability." *Id.*, at 284–285, n. 12.

tory suggest that Congress intended to limit the trustee's authority to abandon burdensome property where abandonment might be opposed by those charged with the exercise of state police or regulatory powers.

The Court seeks to turn the seemingly unqualified language and the absence of helpful legislative history to its advantage. Adopting the reasoning of the Court of Appeals, the Court argues that in light of Congress' failure to elaborate, § 554 must have been intended to codify prior "abandonment" case law, and that under prior law "a trustee could not exercise his abandonment power in violation of certain state and federal laws," *ante*, at 501. I disagree. We have previously expressed our unwillingness to read into unqualified statutory language exceptions or limitations based upon legislative history unless that legislative history demonstrates with extraordinary clarity that this was indeed the intent of Congress. *E. g.*, *Garcia* v. *United States*, 469 U. S. 70, 75 (1984). I think that upon analysis the "legislative history" relied upon by the Court here falls far short of this standard.

The Court relies on just three cases for its claimed "established corollary" to the pre-Code abandonment power. A close reading of those cases, however, reveals that none supports the rule announced today. In *Ottenheimer* v. *Whitaker*, 198 F. 2d 289 (CA4 1952), the Court of Appeals held that a trustee could not abandon worthless barges obstructing traffic in Baltimore Harbor when the abandonment would have violated federal law. The Court concluded that the "judge-made rule [of abandonment] must give way" to "an Act of Congress in the public interest." *Id.*, at 290. *Ottenheimer* thus depended on the need to reconcile a conflict between a judicial gloss on the Bankruptcy Act and the commands of another federal statute. We implicitly confirmed the validity of such an approach two Terms ago in *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513, 523–524 (1984). Here, by contrast, the "conflict" is with the uncertain commands of

state laws that the Court declines to identify.[3] In addition, the Court of Appeals relied heavily on the fact that the pre-Code law of abandonment was judge-made, which in turn raises the somewhat Delphic inquiry as to whether that court would have decided the case the same way under the present Code.

In re Lewis Jones, Inc., 1 BCD 277 (Bkrtcy Ct. ED Pa. 1974), was a Bankruptcy Court decision concluding that the principle of *Ottenheimer* did not apply because there was no conflicting statute. But because the right to abandon was based on judge-made law, the court nonetheless found itself free to protect the public interest by requiring a trustee seeking abandonment to first spend funds of the estate to seal manholes and vents in an underground pipe network. While this case admittedly comes closer to supporting the Court's position than does *Ottenheimer*, it too turns on the judge-made nature of the abandonment power. Moreover, I do not believe that the isolated decision of a single Bankruptcy Court rises to the level of "established law" that we can fairly assume Congress intended to incorporate. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 379–382 (1982).

In *In re Chicago Rapid Transit Co.*, 129 F. 2d 1 (CA7), cert. denied *sub nom. Chicago Junction R. Co.* v. *Sprague*, 317 U. S. 683 (1942), the District Court sitting in bankruptcy had authorized the bankrupt to abandon a lease of a rail line, and a lessor appealed. The bankrupt did not appeal the District Court's imposition of conditions on the abandonment; the propriety of those conditions thus was not before the

[3] The Court finds "additional support" for its restriction of the abandonment power in recent federal statutes concerned with protecting the environment. If these statutes operated to bar abandonment here—something neither respondents nor the Court suggests—then this might be a different case. See *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513 (1984). But the statutes do not bar abandonment, and the majority's reference to their obvious concern over the risks of storing hazardous substances is little more than a makeweight.

Court of Appeals, which affirmed the District Court's *authorization* of abandonment. So while there may be dicta in the Court of Appeals' opinion that would support some limitation on the power of abandonment, the holding of the case certainly does not. In short, none of these cases supports the Court's view that § 554(a) contains an implicit exception for "certain state and local laws."

Even assuming these cases stand for the proposition ascribed to them in the Court's opinion, that opinion's brief discussion of the cases, *ante*, at 500–501, certainly does not support the claim that they reflect an "established corollary" to pre-Code abandonment law. Generally speaking, three rather isolated cases do not constitute the sort of settled law that we can fairly assume Congress intended to codify absent some expression of its intent to do so. Perhaps recognizing this, respondents place substantial reliance for their view that the exception was "well settled" on the following statement in the (pre-Code) 14th edition of Collier on Bankruptcy, accompanying a citation to *Ottenheimer* and *Chicago Rapid Transit:* "Recent cases illustrate, however, that the trustee in the exercise of the power to abandon is subject to the application of general regulations of a police nature." 4A J. Moore, Collier on Bankruptcy ¶ 70.42[2], pp. 502–504 (14th ed. 1978); see also *In re Quanta Resources Corp.*, 739 F. 2d 912, 916 (1984) (quoting same language from Collier). Respondents further observe that the section of this treatise addressing abandonment was cited in a note to an early precursor of § 554, § 4–611 of the proposed Bankruptcy Act of 1973, H. R. Doc. No. 93–137, Part II, p. 181, reprinted in A. Resnick & E. Wypyski, 2 Bankruptcy Reform Act of 1978: A Legislative History, Doc. No. 22 (1979). While resourceful, this argument is wholly unpersuasive.

The reference to Collier is not part of the Code's "'legislative history' in any meaningful sense of the term," *Board of Governors, FRS* v. *Dimension Financial Corp.*, *ante*, at 372. And the proposition for which the section in Collier is cited is

not the view that authority for abandonment is qualified by state police power, but instead the much less remarkable proposition that "[t]he concept of abandonment is well recognized in the case law. See 4A Collier ¶70.42[3]." In order to divine that the statutory power to abandon in the proposed Code was to be conditioned on compliance with state police power regulations, therefore, a Senator or Congressman would not merely have had to look at the legislative history of the precursor to the Code, but also would have had to read the several-page treatise section cited in that earlier legislative history.

Neither the three cases cited by the Court nor the attenuated reference to the since superseded version of Collier supports the inference that Congress, while writing § 554 in unqualified terms, intended to incorporate so ill-defined and uncertain an exception to the abandonment authority of the trustee. After suggesting that "if Congress intends for legislation to change the interpretation of a judicially created concept" it should do so expressly, *ante*, at 501, the Court concedes that these cases "do not define for us the exact contours of the trustee's abandonment power," *ibid.* The Court never identifies the source from which it draws the "exact contours" of the rule it announces today; congressional intent does not appear to be a likely candidate. Congress knew how to draft an exception covering the exercise of "certain" police powers when it wanted to. See 11 U. S. C. §§ 362(b)(4), (5) (1982 ed. and Supp. II); *supra*, at 509. It also knew how to draft a qualified abandonment provision. See § 1170(a)(2) (abandonment of railroad lines permitted only if "consistent with the public interest"). Congress' failure to so qualify § 554 indicates that it intended the relevant inquiry at an abandonment hearing to be limited to whether the property is burdensome and of inconsequential value to the estate.

I find the Court's discussion of 28 U. S. C. § 959(b) somewhat difficult to fathom. After suggesting that § 959(b)

"provides additional evidence" for the self-evident proposition "that Congress did not intend for the Bankruptcy Code to pre-empt all state laws," *ante*, at 505, the Court concedes that the provision "does not *directly* apply to an abandonment under § 554(a) of the Bankruptcy Code," *ibid.* (emphasis added). The precise nature of its *indirect* application, however, is left unclear. Respondents contend that § 959(b) operates to bar abandonment in these cases. Assuming that temporary management or operation of a facility during liquidation is governed by § 959(b), I believe that a trustee's filing of a petition to abandon, as opposed to continued operation of a site pending a decision to abandon, does not constitute "manage[ment]" or "opera[tion]" under that provision. Not only would a contrary reading strain the language of § 959(b), cf. *In re Adelphi Hospital Corp.*, 579 F. 2d 726, 729, n. 6 (CA2 1978) *(per curiam)* (in pre-Code liquidation proceeding trustee "is in no sense a manager of an institution's operations"), it also would create an exception to the abandonment power without a shred of evidence that Congress intended one. As one commentator has noted, § 554(a) "is among the few provisions in the Bankruptcy Code that do not contain explicit exceptions." Note, 85 Colum. L. Rev. 870, 883 (1985). I would not read 28 U. S. C. § 959(b) as creating an implicit exception.

Citing *SEC* v. *United Realty & Improvement Co.*, 310 U. S. 434, 455 (1940), respondents argue that the Bankruptcy Court's equitable powers support the result reached below. I disagree. While the Bankruptcy Court is a court of equity, the Bankruptcy Code "does not authorize freewheeling consideration of every conceivable equity." *Bildisco & Bildisco*, 465 U. S., at 527. The Bankruptcy Court may not, in the exercise of its equitable powers, enforce its view of sound public policy at the expense of the interests the Code is designed to protect. In these cases, it is undisputed that the properties in question were burdensome and of inconsequential value to the estate. Forcing the trustee to expend es-

tate assets to clean up the sites would plainly be contrary to the purposes of the Code.

I fully appreciate the Court's concern that abandonment may "aggravat[e] already existing dangers by halting security measures that preven[t] public entry, vandalism, and fire." *Ante*, at 499, n. 3. But in almost all cases, requiring the trustee to notify the relevant authorities before abandoning will give those authorities adequate opportunity to step in and provide needed security. As the Bankruptcy Court noted in No. 84–805: "The City and State are in a better position in every respect than either the Trustee or debtor's creditors to do what needs to be done to protect the public against the dangers posed by the PCB-contaminated facility." App. to Pet. for Cert. 73a. And requiring notice before abandonment in appropriate cases is perfectly consistent with the Code. It advances the State's interest in protecting the public health and safety, and, unlike the rather uncertain exception to the abandonment power propounded by the Court, at the same time allows for the orderly liquidation and distribution of the estate's assets. Here, of course, the trustee provided such notice and the relevant authorities were afforded an opportunity to take appropriate preventative and remedial measures.

I likewise would not exclude the possibility that there may be a far narrower condition on the abandonment power than that announced by the Court today, such as where abandonment by the trustee itself might create a genuine emergency that the trustee would be uniquely able to guard against. The United States in its brief as *amicus curiae* suggests, for example, that there are limits on the authority of a trustee to abandon dynamite sitting on a furnace in the basement of a schoolhouse. Although I know of no situations in which trustees have sought to abandon dynamite under such circumstances, the narrow exception that I would reserve surely would embrace that situation.

What the Court fails to appreciate is that respondents' interest in these cases lies not just in protecting public health and safety but also in protecting the public fisc. In No. 84–805, before undertaking cleanup efforts, New York unsuccessfully sought from the Bankruptcy Court a first lien on the Long Island City property to the extent of any expenditures it might make to bring the site into compliance with state and local law. New York did not appeal the court's denial of a first lien, and proceeded to clean up the site (except for the contaminated subsoil). It now presses a claim for reimbursement, maintaining that the trustee should not have been allowed to abandon the site. The New Jersey Department of Environmental Protection, in No. 84–801, apparently seeks to undo the abandonment and force the trustee to expend the estate's remaining assets cleaning up the site, thereby reducing the cleanup costs that must ultimately be borne by the State.[4]

The Court states that the "abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm." *Ante*, at 507, n. 9. Because the Court declines to identify those laws that its deems so "reasonably calculated," I can only speculate about its view of respondents' claim that abandonment can be conditioned on a total cleanup. One might assume, however, that since it affirms the judgments below the Court means to adopt respondents' position. The Court of Appeals, as I read its opinions in these cases, apparently would require the trustee to expend all of Quanta's available assets to clean up the sites.[5] But barring abandonment and forcing a cleanup would effectively

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[4] NJDEP does not contend that the estate, including any assets otherwise subject to Midlantic's secured claim, contains sufficient assets to complete the cleanup.

[5] I would think that this command qualifies, in the words of the Court, as a "conditio[n] on abandonment . . . so onerous as to interfere with the bankruptcy adjudication itself," *ante*, at 507.

place respondents' interest in protecting the public fisc ahead of the claims of other creditors. Congress simply did not intend that § 554 abandonment hearings would be used to establish the priority of particular claims in bankruptcy. While States retain considerable latitude to ensure that priority status is allotted to their cleanup claims, see *Ohio* v. *Kovacs*, 469 U. S., at 285–286 (O'CONNOR, J., concurring), I believe that the Court errs by permitting them to impose conditions on the abandonment power that Congress never contemplated. Accordingly, in each of these cases I would reverse the judgment of the Court of Appeals.

PARSONS STEEL, INC., ET AL. *v.* FIRST ALABAMA BANK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 84-1616. Argued December 3, 1985—Decided January 27, 1986

Petitioners sued respondents in an Alabama state court, alleging that respondent bank had fraudulently induced petitioner individuals to permit a third person to take control of a subsidiary of petitioner corporation and eventually to obtain complete ownership. Subsequently, the subsidiary was adjudicated an involuntary bankrupt. Petitioners then sued the bank in Federal District Court, alleging that the same conduct on the bank's part that was the subject of the state suit violated the Bank Holding Company Act (BHCA) amendments. The federal action went to trial before the state action, and the District Court granted judgment n.o.v. for the bank. The Court of Appeals affirmed. Thereafter, respondents pleaded a res judicata defense in the state action based on the federal judgment, but the Alabama court denied the defense. After the state complaint was amended to include a Uniform Commercial Code (UCC) claim that the bank's foreclosure sale of the subsidiary's assets was commercially unreasonable, the jury returned a verdict for damages in petitioners' favor. Respondents then returned to the District Court and filed an injunctive action against petitioners. Holding that the state fraud and UCC claims should have been raised in the federal action as pendent to the BHCA claim and accordingly that the BHCA judgment barred the state claims under res judicata, the District Court enjoined petitioners from further prosecuting the state action. The Court of Appeals affirmed, holding that the parties to the BHCA action were barred by res judicata from raising the state claims in state court after the entry of the federal judgment, and that the federal injunction was proper under the "relitigation exception" to the Anti-Injunction Act, which generally prohibits a federal court from enjoining state proceedings but excepts from the prohibition the issuance of an injunction by a federal court "where necessary . . . to protect or effectuate its judgments." The court did not consider the possible preclusive effect under Alabama law of the state court's resolution of the res judicata issue, holding instead that the "relitigation exception" to the Anti-Injunction Act worked a *pro tanto* amendment to the Full Faith and Credit Act, which requires federal courts as well as state courts to give state judicial proceedings "the

same full faith and credit . . . as they have by law or usage in the courts of such State . . . from which they are taken."

Held: The Court of Appeals erred by refusing to consider the possible preclusive effect under Alabama law of the state-court judgment. Even if the state court mistakenly rejected respondents' res judicata claim, this would not justify the highly intrusive remedy of a federal-court injunction against enforcement of the state-court judgment. Rather, the Full Faith and Credit Act requires that the federal courts give the state-court judgment, and particularly the state court's resolution of the res judicata issue, the same preclusive effect it would have in another court of the same State. Pp. 523–526.

747 F. 2d 1367, reversed and remanded.

REHNQUIST, J., delivered the opinion for a unanimous Court.

Frank M. Wilson argued the cause for petitioners. With him on the briefs was *James Jerry Wood.*

M. Roland Nachman, Jr., argued the cause for respondents. With him on the brief was *James A. Byram, Jr.*

JUSTICE REHNQUIST delivered the opinion of the Court.

The Full Faith and Credit Act, 28 U. S. C. § 1738, requires federal courts as well as state courts to give state judicial proceedings "the same full faith and credit . . . as they have by law or usage in the courts of such State . . . from which they are taken." The Anti-Injunction Act, 28 U. S. C. § 2283, generally prohibits a federal court from granting an injunction to stay proceedings in a state court, but excepts from that prohibition the issuance of an injunction by a federal court "where necessary . . . to protect or effectuate its judgments." In the present case the Court of Appeals for the Eleventh Circuit held that the quoted exception to the latter Act worked a *pro tanto* amendment to the former, so that a federal court might issue an injunction against state-court proceedings even though the prevailing party in the federal suit had litigated in the state court and lost on the res judicata effect of the federal judgment. We granted certiorari to consider this question, 472 U. S. 1026 (1985), and now reverse the judgment of the Court of Appeals.

Petitioners Parsons Steel, Inc., and Jim and Melba Parsons sued respondents First Alabama Bank of Montgomery and Edward Herbert, a bank officer, in Alabama state court in February 1979, essentially alleging that the bank had fraudulently induced the Parsonses to permit a third person to take control of a subsidiary of Parsons Steel and eventually to obtain complete ownership of the subsidiary. The subsidiary was adjudicated an involuntary bankrupt in April 1979, and the trustee in bankruptcy was added as a party plaintiff in the state action. In May 1979 Parsons Steel and the Parsonses sued the bank in the United States District Court for the District of Alabama, alleging that the same conduct on the part of the bank that was the subject of the state-court suit also violated the Bank Holding Company Act (BHCA) amendments, 12 U. S. C. §§ 1971–1978. The trustee in bankruptcy chose not to participate in the federal action.

The parties conducted joint discovery in the federal and state actions. The federal action proceeded to trial on the issue of liability before the state action went to trial. A jury returned a verdict in favor of petitioners, but the District Court granted judgment n.o.v. to the bank. That judgment was affirmed on appeal. *Parsons Steel, Inc.* v. *First Alabama Bank of Montgomery*, 679 F. 2d 242 (CA11 1982). After the federal judgment was entered, respondents pleaded in the state action the defenses of res judicata and collateral estoppel based on that judgment. The Alabama court, however, ruled that res judicata did not bar the state action. Almost a year after the federal judgment was entered, the state complaint was amended to include a Uniform Commercial Code (UCC) claim that the bank's foreclosure sale of the subsidiary's assets was commercially unreasonable. A jury returned a general verdict in favor of petitioners, awarding a total of four million and one dollars in damages.

Having lost in state court, respondents returned to the District Court that had previously entered judgment in the

bank's favor and filed the present injunctive action against petitioners, the plaintiffs in the state action.[1] The District Court found that the federal BHCA suit and the state action were based on the same factual allegations and claimed substantially the same damages. The court held that the state claims should have been raised in the federal action as pendent to the BHCA claim and accordingly that the BHCA judgment barred the state claims under res judicata. Determining that the Alabama judgment in effect nullified the earlier federal-court judgment in favor of the bank, the District Court enjoined petitioners from further prosecuting the state action.

A divided panel of the Court of Appeals affirmed in relevant part, holding that the issuance of the injunction was not "an abuse of discretion" by the District Court. 747 F. 2d 1367, 1381 (1980). The majority first agreed with the District Court that the fraud and UCC claims presented issues of fact and law that could have been and should have been raised in the same action as the BHCA claim. Thus the parties to the BHCA action and their privies, including the trustee in bankruptcy, were barred by res judicata from raising these claims in state court after the entry of the federal judgment.

The majority then held that the injunction was proper under the so-called "relitigation exception" to the Anti-Injunction Act, 28 U. S. C. § 2283, which provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or *to protect or effectuate its judgments*" (emphasis added).

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[1] Although the opinion of the Court of Appeals does not mention it, respondents apparently also filed in state court a timely post-trial motion for new trial or judgment n.o.v.

In reaching this holding, the majority explicitly declined to consider the possible preclusive effect, pursuant to the Full Faith and Credit Act, 28 U. S. C. § 1738,[2] of the state court's determination after full litigation by the parties that the earlier federal-court judgment did not bar the state action. According to the majority, "while a federal court is generally bound by other state court determinations, the relitigation exception empowers a federal court to be the final adjudicator as to the res judicata effects of its prior judgments on a subsequent state action." 747 F. 2d, at 1376 (footnote omitted).

Finally, the majority ruled that respondents had not waived their right to an injunction by waiting until after the trial in the state action was completed. The majority concluded that the state-court pleadings were so vague that it was not clear until after trial that essentially the same cause of action was involved as the BHCA claim and that the earlier federal judgment was in danger of being nullified. According to the majority, the Anti-Injunction Act does not limit the power of a federal court to protect its judgment "to specific points in time in state court trials or appellate procedure." *Id.*, at 1377.[3]

The dissenting judge rejected "the majority's conclusion that the Anti-Injunction Act . . . implicitly amended the Full Faith and Credit Act, 28 U. S. C. § 1738." *Id.*, at 1381 (Hill, J., dissenting). He agreed with the majority that "section 2283 allows the district court to enter an injunction, perhaps grounded in the concept of res judicata, unless the state court

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[2] The Full Faith and Credit Act provides, in pertinent part, that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

[3] The Court of Appeals remanded the case to the District Court for a determination whether the trustee in bankruptcy should be allowed to litigate his UCC claim in state court because the trustee was not a party to the federal suit and the UCC claim might have been based on facts other than those that formed the basis for the federal action.

has already addressed the res judicata issue on the merits," but would have held in cases where the state court has decided the res judicata issue that "section 1738 requires the federal court to afford full faith and credit to the state court's resolution of the issue." *Ibid.*

In our view, the majority of the Court of Appeals gave unwarrantedly short shrift to the important values of federalism and comity embodied in the Full Faith and Credit Act. As recently as last March, in *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U. S. 373 (1985), we reaffirmed our holding in *Migra* v. *Warren City School Dist. Bd. of Education*, 465 U. S. 75 (1984), that under the Full Faith and Credit Act a federal court must give the same preclusive effect to a state-court judgment as another court of that State would give. "It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken." *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461, 481–482 (1982). The Full Faith and Credit Act thus "allow[s] the States to determine, subject to the requirements of the statute and the Due Process Clause, the preclusive effect of judgments in their own courts." *Marrese*, *supra*, at 380.

In the instant case, however, the Court of Appeals did not consider the possible preclusive effect under Alabama law of the state-court judgment, and particularly of the state court's resolution of the res judicata issue, concluding instead that the relitigation exception to the Anti-Injunction Act limits the Full Faith and Credit Act. We do not agree. "[A]n exception to § 1738 will not be recognized unless a later statute contains an express or implied partial repeal." *Kremer*, *supra*, at 468; *Allen* v. *McCurry*, 449 U. S. 90, 99 (1980). Here, as in *Kremer*, there is no claim of an express repeal; rather, the Court of Appeals found an implied repeal. "'It

is, of course, a cardinal principle of statutory construction that repeals by implication are not favored,' *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 154 (1976); *United States* v. *United Continental Tuna Corp.*, 425 U. S. 164, 168 (1976), and whenever possible, statutes should be read consistently." 456 U. S., at 468. We believe that the Anti-Injunction Act and the Full Faith and Credit Act can be construed consistently, simply by limiting the relitigation exception of the Anti-Injunction Act to those situations in which the state court has not yet ruled on the merits of the res judicata issue. Once the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision.

The contrary holding of the Court of Appeals apparently was based on the fact that Congress in 1948 amended the Anti-Injunction Act to overrule this Court's decision in *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118 (1941), in favor of the understanding of prior law expressed in Justice Reed's dissenting opinion. See Revisor's Note to 1948 Revision of Anti-Injunction Act, 28 U. S. C., p. 377. But the instant case is a far cry from *Toucey*, and one may fully accept the logic of Justice Reed's dissent without concluding that it sanctions the result reached by the Court of Appeals here. In each of the several cases involved in *Toucey*, the prevailing party in the federal action sought an injunction against relitigation in state court as soon as the opposing party commenced the state action, and before there was any resolution of the res judicata issue by the state court. In the instant case, on the other hand, respondents chose to fight out the res judicata issue in state court first, and only after losing there did they return to federal court for another try.

The Court of Appeals also felt that the District Court's injunction would discourage inefficient simultaneous litigation in state and federal courts on the same issue—that is, the res

judicata effect of the prior federal judgment. But this is one of the costs of our dual court system:

> "In short, the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts." *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 295 (1970).

Indeed, this case is similar to *Atlantic Coast Line*, in which we held that the various exceptions to the Anti-Injunction Act did not permit a federal court to enjoin state proceedings in circumstances more threatening to federal jurisdiction than the circumstances of this case. There we stated that the phrase "to protect or effectuate its judgments" authorized a federal injunction of state proceedings only "to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Ibid.*

We hold, therefore, that the Court of Appeals erred by refusing to consider the possible preclusive effect, under Alabama law, of the state-court judgment. Even if the state court mistakenly rejected respondents' claim of res judicata, this does not justify the highly intrusive remedy of a federal-court injunction against the enforcement of the state-court judgment. Rather, the Full Faith and Credit Act requires that federal courts give the state-court judgment, and particularly the state court's resolution of the res judicata issue, the same preclusive effect it would have had in another court of the same State. Challenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court. See *Angel* v. *Bullington*, 330 U. S. 183 (1947).

We think the District Court is best situated to determine and apply Alabama preclusion law in the first instance. See *Marrese* v. *American Academy of Orthopaedic Surgeons*,

supra, at 386–387; *Migra* v. *Warren City School Dist. Bd. of Education*, 465 U. S., at 87. Should the District Court conclude that the state-court judgment is not entitled to preclusive effect under Alabama law and the Full Faith and Credit Act, it would then be in the best position to decide the propriety of a federal-court injunction under the general principles of equity, comity, and federalism discussed in *Mitchum* v. *Foster*, 407 U. S. 225, 243 (1972).

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.[4]

It is so ordered.

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[4] As an alternative basis for reversing the decision of the Court of Appeals, petitioners contend that the relitigation exception to the Anti-Injunction Act was never intended by Congress to allow the issuance of a federal-court injunction in situations where the later state action involves claims that could have been litigated, but were not actually litigated, in the prior federal action. Petitioners also ask us to review the Court of Appeals' holding that the trustee in bankruptcy, who was not a party to the first federal action, was nevertheless bound under res judicata by the judgment of the District Court in that action. Because of our resolution of the primary issue raised by petitioners, we do not address these additional arguments.

REPORTER'S NOTE

The next page is purposely numbered 801. The numbers between 526 and 801 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM OCTOBER 7, 1985, THROUGH FEBRUARY 21, 1986

OCTOBER 7, 1985

Dismissal Under Rule 53

No. 85–561. JONES ET AL. *v.* LIGHTNER, DBA LIGHTNER AUTO SALES. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 752 F. 2d 1251.

Affirmed on Appeal

No. 84–1794. GERACE, COMMISSIONER, NEW YORK DEPARTMENT OF AGRICULTURE AND MARKETS, ET AL. *v.* GROCERY MANUFACTURERS OF AMERICA, INC., ET AL. Appeal from C. A. 2d Cir. Motion of Federation of Homemakers, Inc., for leave to file a brief as *amicus curiae* granted. Judgment affirmed. JUSTICE REHNQUIST and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. Reported below: 755 F. 2d 993.

Appeals Dismissed

No. 84–1791. CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC., ET AL. *v.* TEXAS. Appeal from Sup. Ct. Tex. dismissed for want of substantial federal question. Reported below: 683 S. W. 2d 692.

No. 84–1804. WALKER *v.* CITY OF WARREN. Appeal from Ct. App. Mich. dismissed for want of substantial federal question. Reported below: 135 Mich. App. 267, 354 N. W. 2d 312.

No. 84–1841. METHODIST HOSPITAL OF BROOKLYN ET AL. *v.* STATE INSURANCE FUND ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 64 N. Y. 2d 365, 476 N. E. 2d 304.

No. 84–1882. ST. JOSEPH'S HILL INFIRMARY, INC. *v.* PACIFIC CARE CENTER, INC. Appeal from Ct. App. Mo., Eastern Dist., dismissed for want of substantial federal question. Reported below: 682 S. W. 2d 821.

No. 84-1901. WHALEN *v.* DEAN STEEL ERECTION CO., INC. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question. Reported below: 229 Va. 164, 327 S. E. 2d 102.

No. 84-1921. MARSHALL *v.* COURT OF APPEALS OF MARYLAND. Appeal from Ct. App. Md. dismissed for want of substantial federal question.

No. 84-1933. COREY OUTDOOR ADVERTISING, INC. *v.* BOARD OF ZONING ADJUSTMENT OF THE CITY OF ATLANTA ET AL. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 254 Ga. 221, 327 S. E. 2d 178.

No. 84-1941. CALDER RACE COURSE, INC., ET AL. *v.* DIVISION OF PARI-MUTUEL WAGERING, DEPARTMENT OF BUSINESS REGULATION, ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 464 So. 2d 128.

No. 84-6766. THOMSEN *v.* AMERICAN LUTHERAN CHURCH, INC., ET AL. Appeal from Ct. App. Minn. dismissed for want of substantial federal question.

No. 84-6800. RHODES *v.* BOARD OF EDUCATION OF THE CHAMA VALLEY INDEPENDENT SCHOOL DISTRICT ET AL. Appeal from Sup. Ct. N. M. dismissed for want of substantial federal question. Reported below: 102 N. M. 293, 694 P. 2d 1358.

No. 84-6888. RASKE *v.* JORANDBY ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 469 So. 2d 750.

No. 84-6997. PENZA *v.* NEW ENGLAND MEDICAL CENTER INC. ET AL. Appeal from App. Ct. Mass. dismissed for want of substantial federal question. Reported below: 19 Mass. App. 1106, 472 N. E. 2d 1390.

No. 85-4. MARESCA ET AL. *v.* CUOMO, GOVERNOR OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 64 N. Y. 2d 242, 475 N. E. 2d 95.

No. 85-72. MAINE STATE TROOPERS ASSN. *v.* MAINE ET AL. Appeal from Sup. Jud. Ct. Me. dismissed for want of substantial federal question. Reported below: 491 A. 2d 538.

No. 85–110. BINT ET AL. *v.* CREATIVE FOREST PRODUCTS ET AL. Appeal from Sup. Ct. Idaho dismissed for want of substantial federal question. Reported below: 108 Idaho 116, 697 P. 2d 818.

No. 85–189. NORTON *v.* ILLINOIS. Appeal from App. Ct. Ill., 3d Dist., dismissed for want of substantial federal question. Reported below: 127 Ill. App. 3d 1169, 483 N. E. 2d 733.

No. 85–205. ASMUSSEN ET AL. *v.* CITY OF AUSTIN, TEXAS, ET AL. (two cases). Appeals from Ct. App. Tex., 3d Sup. Jud. Dist., dismissed for want of substantial federal question.

No. 85–5010. MIHAL ET AL. *v.* SARGIS ET AL. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question.

No. 85–5177. GORDON *v.* IDAHO. Appeal from Ct. App. Idaho dismissed for want of substantial federal question. Reported below: 108 Idaho 178, 697 P. 2d 1192.

No. 84–1824. WHITAKER ET AL. *v.* KNAPP. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 757 F. 2d 827.

No. 84–1835. AMERICAN INSURANCE ASSN. ET AL. *v.* CHU, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 64 N. Y. 2d 379, 476 N. E. 2d 637.

No. 84–1860. ROUSSOS *v.* RETINA CONSULTANTS, P. C., ET AL. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 59 Md. App. 739.

No. 84–1902. STRODE *v.* GREGORY ET AL. Appeal from Ct. App. Cal., 3d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84–1945. GALUSZKA *v.* SCHWAB, FOR AND ON BEHALF OF THE MINOR, SCHWAB. Appeal from Ct. App. La., 4th Cir., dismissed for want of jurisdiction. Treating the papers whereon the

appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 463 So. 2d 737.

No. 84–1968. ZUGER *v.* UNITED STATES. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84–6832. RUCKER *v.* CITY OF ST. LOUIS ET AL. Appeal from C. A. 8th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84–6856. PRENZLER *v.* REYNOLDS, U. S. ATTORNEY, ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84–6961. RODMAN *v.* CONTINENTAL INSURANCE COS. ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 753 F. 2d 1083.

No. 85–92. EDGERTON *v.* DELAWARE. Appeal from Sup. Ct. Del. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 497 A. 2d 786.

No. 85–95. MOELLER *v.* CARRADINE ET AL. Appeal from C. A. 8th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85–102. MEN'S WEARHOUSE, INC. *v.* HELMS. Appeal from Ct. App. Tex., 1st Sup. Jud. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 682 S. W. 2d 429.

No. 85–116. PETERS *v.* CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85–134. ZUGER *v.* UNITED STATES. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 755 F. 2d 915.

No. 85–5007. PAVILONIS *v.* MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 394 Mass. 1001, 475 N. E. 2d 75.

No. 85–5148. BOWDEN *v.* IDAHO DEPARTMENT OF HEALTH AND WELFARE. Appeal from Sup. Ct. Idaho dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 108 Idaho 101, 697 P. 2d 441.

No. 84–1891. BRUNO *v.* NEW ORLEANS DEPARTMENT OF POLICE. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would postpone consideration of question of jurisdiction to a hearing of the case on the merits. Reported below: 462 So. 2d 139.

No. 84–6865. RUCKER *v.* CITY OF ST. LOUIS ET AL. Appeal from D. C. E. D. Mo. dismissed for want of jurisdiction.

No. 85–57. STOP-N-GO, INC. *v.* BRADFIELD, ADMINISTRATOR OF THE ESTATE OF BRADFIELD. Appeal from Sup. Ct. Ohio dismissed for want of jurisdiction. Reported below: 17 Ohio St. 3d 58, 477 N. E. 2d 621.

No. 85–148. BLUE CROSS & BLUE SHIELD OF MICHIGAN *v.* MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. Appeal from Sup. Ct. Mich. dismissed for want of substantial federal question. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 422 Mich. 1, 367 N. W. 2d 1.

Certiorari Granted—Vacated and Remanded

No. 84–1715. CITY OF LAWTON, OKLAHOMA, ET AL. *v.* LUSBY ET AL. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Oklahoma*

City v. *Tuttle*, 471 U. S. 808 (1985). Reported below: 749 F. 2d 1423.

No. 84–1768. ALABAMA DEPARTMENT OF CORRECTIONS *v.* GLOVER. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Kentucky* v. *Graham*, 473 U. S. 159 (1985). Reported below: 734 F. 2d 691 and 753 F. 2d 1569.

No. 84–1971. SUN OIL CO. *v.* WORTMAN ET AL. Sup. Ct. Kan. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797 (1985). Reported below: 236 Kan. 266, 690 P. 2d 385.

No. 84–6842. WILLIAMS *v.* KEMP, WARDEN. Sup. Ct. Ga. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Francis* v. *Franklin*, 471 U. S. 307 (1985).

No. 84–6946. JEFFERSON *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Garrett* v. *United States*, 471 U. S. 773 (1985). Reported below: 760 F. 2d 821.

No. 84–6953. BURGER *v.* KEMP, WARDEN. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Francis* v. *Franklin*, 471 U. S. 307 (1985). Reported below: 753 F. 2d 930.

No. 85–66. FLORIDA *v.* ARANGO. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Bagley*, 473 U. S. 667 (1985). JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS dissent and would deny certiorari. Reported below: 467 So. 2d 692.

No. 85–5078. SOTELO *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the

Court of Appeals for further proceedings, including, if appropriate, the reentry of its judgment affirming petitioner's conviction and appointment of counsel to assist petitioner in seeking timely review of that judgment in this Court. JUSTICE REHNQUIST dissents. Reported below: 742 F. 2d 1451.

Certiorari Dismissed

No. 84-1862. MORELAND *v.* POSS. Sup. Ct. Ga. Certiorari dismissed for want of a final judgment. Reported below: 253 Ga. 730, 324 S. E. 2d 456.

Miscellaneous Orders

No. ——. C. H. B. FOODS, INC. *v.* ENGLISH; and

No. ——. HYLIN, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HYLIN *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. A-41. PARK COUNTY RESOURCE COUNCIL, INC., ET AL. *v.* UNITED STATES DEPARTMENT OF AGRICULTURE ET AL. D. C. Wyo. Application for stay pending appeal, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A-88. HELFRICHT *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Application to continue a stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-145. SCHUCHMAN ET AL. *v.* UNITED STATES. Application for injunction and all other relief, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D-312. IN RE ERGAZOS, 460 U. S. 1065. Application for reinstatement to the Bar of this Court denied.

No. D-488. IN RE DISBARMENT OF ROUSE. Disbarment entered. [For earlier order herein, see 471 U. S. 1012.]

No. D-496. IN RE DISBARMENT OF HYTER. Charles Kilburn Hyter, of Hutchinson, Kan., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on June 3, 1985 [471 U. S. 1133], is hereby discharged.

No. D-498. IN RE DISBARMENT OF SLONE. Harold G. Slone, of New York, N. Y., having requested to resign as a member of

the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on June 3, 1985 [471 U. S. 1134], is hereby discharged.

No. D–499. IN RE DISBARMENT OF JACOB. Disbarment entered. [For earlier order herein, see 472 U. S. 1005.]

No. D–500. IN RE DISBARMENT OF WALTERS. Harris N. Walters, of Boynton, Fla., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on June 10, 1985 [472 U. S. 1005], is hereby discharged.

No. D–502. IN RE DISBARMENT OF ATKINS. Benjamin Sloan Atkins, of Atlanta, Ga., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on June 10, 1985 [472 U. S. 1005], is hereby discharged.

No. D–520. IN RE DISBARMENT OF WATSON. It is ordered that Roland Watson, of Central Islip, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. Exceptions to the Report of the Special Master are set for oral argument in due course. [For earlier order herein, see, *e. g.*, 472 U. S. 1015.]

No. 83–1968. THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. *v.* GINGLES ET AL. D. C. E. D. N. C. [Probable jurisdiction noted, 471 U. S. 1064.] Motions of Legal Services of North Carolina, Dennis DeConcini et al., Common Cause, American Civil Liberties Union Foundation, Inc., et al., and James G. Martin, Governor of North Carolina, for leave to file briefs as *amici curiae* granted. Motion of appellants and appellees for leave to file oversized portion of joint appendix granted.

No. 84–127. RICHARDSON-MERRELL INC. *v.* KOLLER, AN INFANT, BY AND THROUGH KOLLER ET UX., HER NATURAL GUARDIANS, ET AL., 472 U. S. 424. Motion of respondents to retax

costs denied. JUSTICE BLACKMUN dissents. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 84–495. THORNBURGH, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL. C. A. 3d Cir. [Probable jurisdiction postponed, 471 U. S. 1014]; and

No. 84–1379. DIAMOND ET AL. *v.* CHARLES ET AL. C. A. 7th Cir. [Probable jurisdiction noted, 471 U. S. 1115.] Motion of Women Lawyers' Association of Los Angeles, California, et al. for leave to file a brief as *amici curiae* granted.

No. 84–871. LOUISIANA PUBLIC SERVICE COMMISSION *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. [Probable jurisdiction postponed, 472 U. S. 1025];

No. 84–889. CALIFORNIA ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. [Certiorari granted, 472 U. S. 1025];

No. 84–1054. PUBLIC UTILITIES COMMISSION OF OHIO ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. [Certiorari granted, 472 U. S. 1025]; and

No. 84–1069. FLORIDA PUBLIC SERVICE COMMISSION *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. [Certiorari granted, 472 U. S. 1026.] Motion of Telephone Ratepayers Association for Cost-Based and Equitable Rates for leave to file a brief as *amicus curiae* granted. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 84–1077. WHITLEY, INDIVIDUALLY AND AS ASSISTANT SUPERINTENDENT, OREGON STATE PENITENTIARY, ET AL. *v.* ALBERS. C. A. 9th Cir. [Certiorari granted, 472 U. S. 1007.] Motion for appointment of counsel granted, and it is ordered that Gene B. Mechanic, Esquire, of Portland, Ore., be appointed to serve as counsel for respondent in this case.

No. 84–1181. NEW YORK *v.* CLASS. Ct. App. N. Y. [Certiorari granted, 471 U. S. 1003.] Motion of William E. Hellerstein, Esquire, to permit Mark C. Cogan, Esquire, to present oral argument *pro hac vice* on behalf on respondent granted.

No. 84–1192. GAF CORP. *v.* CHENG, 472 U. S. 1023. Motion of respondent to retax costs granted.

No. 84–1259. DOW CHEMICAL CO. *v.* UNITED STATES, BY AND THROUGH ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. 6th Cir. [Certiorari granted, 472 U. S. 1007.] Motion of petitioner to maintain under seal portions of the record placed under seal by the United States District Court for the Eastern District of Michigan granted.

No. 84–1273. REGENTS OF THE UNIVERSITY OF MICHIGAN *v.* EWING. C. A. 6th Cir. [Certiorari granted, 470 U. S. 1083.] Further consideration of motion of respondent for leave to amend the Amended Complaint deferred to hearing of case on the merits.

No. 84–1480. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* GREENFIELD. C. A. 11th Cir. [Certiorari granted, 471 U. S. 1098.] Motions of Illinois Psychological Association and American Civil Liberties Union for leave to file briefs as *amici curiae* granted.

No. 84–1503. CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL–CIO, ET AL. *v.* HUDSON ET AL. C. A. 7th Cir. [Certiorari granted, 472 U. S. 1007.] Motion of Chicago Teachers Union, Local No. 1, and Board of Education of City of Chicago for leave to file a joint brief granted.

No. 84–1529. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* AMERICAN HOSPITAL ASSN. ET AL. C. A. 2d Cir. [Certiorari granted, 472 U. S. 1016.] Motion of American Coalition of Citizens with Disabilities et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied. Motion of respondents for divided argument granted.

No. 84–1531. MICHIGAN *v.* JACKSON; and

No. 84–1539. MICHIGAN *v.* BLADEL. Sup. Ct. Mich. [Certiorari granted, 471 U. S. 1124.] Motion of respondents for divided argument granted. Motion of petitioner for divided argument denied.

No. 84–1555. CONNOLLY ET AL., TRUSTEES OF THE OPERATING ENGINEERS PENSION TRUST *v.* PENSION BENEFIT GUARANTY CORPORATION ET AL.; and

No. 84–1567. WOODWARD SAND CO., INC. *v.* PENSION BENEFIT GUARANTY CORPORATION ET AL. D. C. C. D. Cal. [Probable jurisdiction noted, 472 U. S. 1006.] Motion of appellant in

No. 84–1567 for divided argument granted to be divided as follows: 20 minutes for appellants in No. 84–1555 and 10 minutes for appellants in No. 84–1567. Request for additional time for oral argument denied.

No. 84–1601. AETNA LIFE INSURANCE CO. *v.* LAVOIE ET AL. Sup. Ct. Ala. [Probable jurisdiction postponed, 471 U. S. 1134.] Motion of Alabama Defense Lawyers' Association for leave to file a brief as *amicus curiae* granted.

No. 84–1602. ANDERSON ET AL. *v.* LIBERTY LOBBY, INC., ET AL. C. A. D. C. Cir. [Certiorari granted, 471 U. S. 1134.] Motions of Readers' Digest Association, Inc., and Synanon Church et al. for leave to file briefs as *amici curiae* granted.

No. 84–1644. GOLDEN STATE TRANSIT CORP. *v.* CITY OF LOS ANGELES. C. A. 9th Cir. [Certiorari granted, 472 U. S. 1016.] Motion of National League of Cities et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 84–1728. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. D. C. Cir. [Certiorari granted, 472 U. S. 1026.] Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 84–1800. WALTERS ET AL. *v.* SPRUYTTE. C. A. 6th Cir.;
No. 85–23. MARYLAND *v.* LODOWSKI. Ct. App. Md.;
No. 85–24. MARYLAND *v.* ELFADL. Ct. Sp. App. Md.; and
No. 85–100. MICHIGAN *v.* BLACKBURN. Ct. App. Mich. Motions of respondents for leave to proceed *in forma pauperis* granted.

No. 84–1880. CITY OF ALCOA ET AL. *v.* MYERS, ON BEHALF OF HERSELF AND HER THREE MINOR CHILDREN, DIXON ET AL. C. A. 6th Cir. Motion of Tennessee Valley Public Power Association for leave to file a brief as *amicus curiae* granted. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 84–1907. KAISER ALUMINUM & CHEMICAL CORP. ET AL. *v.* BONJORNO ET AL. C. A. 3d Cir.; and
No. 84–2022. 324 LIQUOR CORP., DBA YORKSHIRE WINE & SPIRITS *v.* MCLAUGHLIN ET AL. Appeal from Ct. App. N. Y. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 84-2023. INDEPENDENT BANKERS ASSOCIATION OF NEW YORK STATE, INC., ET AL. *v.* MARINE MIDLAND BANK, N. A., ET AL. C. A. 2d Cir.;

No. 85-98. ANSCHUETZ & CO., GMBH *v.* MISSISSIPPI RIVER BRIDGE AUTHORITY ET AL. C. A. 5th Cir.;

No. 85-99. MESSERSCHMITT BOLKOW BLOHM, GMBH *v.* WALKER ET AL. C. A. 5th Cir.; and

No. 85-182. NORTHWEST CENTRAL PIPELINE CORP. ET AL. *v.* CORPORATION COMMISSION OF KANSAS ET AL. Appeal from Sup. Ct. Kan. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 84-6263. BATSON *v.* KENTUCKY. Sup. Ct. Ky. [Certiorari granted, 471 U. S. 1052.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84-6807. LEE *v.* ILLINOIS. App. Ct. Ill., 5th Dist. [Certiorari granted, 473 U. S. 904.] Motion for appointment of counsel granted, and it is ordered that Randy E. Blue, Esquire, of Mount Vernon, Ill., be appointed to serve as counsel for petitioner in this case.

No. 84-6811. MCCLESKEY *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 11th Cir. Motions of International Human Rights Law Group, Congressional Black Caucus, and Dr. Peter Sperlich et al. for leave to file briefs as *amici curiae* granted.

No. 84-6825. PFEIL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PFEIL *v.* ROGERS, FORMER DISTRICT ATTORNEY OF RUSK COUNTY, ET AL. C. A. 7th Cir.; and

No. 84-6838. BARRETT *v.* UNITED STATES CUSTOMS SERVICE ET AL. C. A. 5th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until October 28, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 84–6974. ALEEM *v.* GENERAL FELT INDUSTRIES, INC., ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until October 28, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85–5028. BURNETTE *v.* UNITED STATES. C. A. 6th Cir.;

No. 85–5150. PREWITT *v.* UNITED STATES POSTAL SERVICE. C. A. 5th Cir.; and

No. 85–5154. GOODLATAW, PERSONAL REPRESENTATIVE FOR THE ESTATE OF GOODLATAW *v.* ALASKA ET AL. Sup. Ct. Alaska. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until October 28, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 85–5115. JORDAN *v.* UNITED STATES DEPARTMENT OF STATE. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until October 28, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), I would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 84–6923. IN RE DAY. Sup. Ct. Tex. Petition for writ of common-law certiorari denied.

No. 84–1969. IN RE KINNANE;
No. 84–1970. IN RE ZUGER;
No. 85–5103. IN RE FORD; and
No. 85–5129. IN RE BLACK. Petitions for writs of habeas corpus denied.

No. 84–1976. IN RE WALTON;
No. 84–1980. IN RE RATCLIFF;
No. 84–6814. IN RE WORD;
No. 84–6894. IN RE WATKINS;
No. 84–6941. IN RE PALLETT;
No. 85–5003. IN RE WHALEY;
No. 85–5160. IN RE SMITH-BEY; and
No. 85–5196. IN RE JOOST. Petitions for writs of mandamus denied.

No. 85–5099. IN RE DAY. Motion of petitioner to defer consideration of the petition for mandamus denied. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 84–1944. UNITED STATES ET AL. *v.* HEMME ET AL. Appeal from D. C. S. D. Ill. Probable jurisdiction noted.

No. 84–2030. BROWN-FORMAN DISTILLERS CORP. *v.* NEW YORK STATE LIQUOR AUTHORITY. Appeal from Ct. App. N. Y. Probable jurisdiction noted limited to Question 2 presented by the statement as to jurisdiction. Reported below: 64 N. Y. 2d 479, 479 N. E. 2d 764.

Certiorari Granted

No. 84–1667. BETHEL SCHOOL DISTRICT NO. 403 ET AL. *v.* FRASER, A MINOR, ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 755 F. 2d 1356.

No. 84–1726. EAST RIVER STEAMSHIP CORP. ET AL. *v.* TRANSAMERICA DELAVAL INC. C. A. 3d Cir. Certiorari granted. Reported below: 752 F. 2d 903.

No. 84–1839. SCHIAVONE ET AL. *v.* FORTUNE, AKA TIME, INC. C. A. 3d Cir. Certiorari granted. Reported below: 750 F. 2d 15.

No. 84–1913. AT&T TECHNOLOGIES, INC. *v.* COMMUNICATIONS WORKERS OF AMERICA ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 751 F. 2d 203.

No. 84–1922. UNITED STATES *v.* KOECHER. C. A. 2d Cir. Certiorari granted. Reported below: 755 F. 2d 1022.

No. 84–1923. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 742 F. 2d 729 and 755 F. 2d 31.

No. 84–1948. BLOCK, SECRETARY OF AGRICULTURE, ET AL. *v.* PAYNE ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 751 F. 2d 1191.

No. 84–1979. PSFS SAVINGS BANK, FSB *v.* VINSON ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 243 U. S. App. D. C. 323, 753 F. 2d 141, and 245 U. S. App. D. C. 306, 760 F. 2d 1330.

No. 85–5. PENNSYLVANIA ET AL. *v.* DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 762 F. 2d 272.

No. 85–21. SQUARE D CO. ET AL. *v.* NIAGARA FRONTIER TARIFF BUREAU, INC., ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 760 F. 2d 1347.

No. 85–54. LIBRARY OF CONGRESS ET AL. *v.* SHAW. C. A. D. C. Cir. Certiorari granted. Reported below: 241 U. S. App. D. C. 355, 747 F. 2d 1469.

No. 85–215. MCMILLAN ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari granted. Reported below: 508 Pa. 25, 494 A. 2d 354.

No. 85–225. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* MICHIGAN ACADEMY OF FAMILY PHYSICIANS ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 757 F. 2d 91.

No. 84–1656. LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSN. ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 2d Cir. Certiorari granted and case set for oral argument in tandem with No. 84–1999, *Local No. 93, Int'l Assn. of Firefighters* v. *Cleveland, infra.* Reported below: 753 F. 2d 1172.

No. 84–1661. KIMMELMAN, ATTORNEY GENERAL OF NEW JERSEY, ET AL. *v.* MORRISON. C. A. 3d Cir. Motion of respond-

ent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 752 F. 2d 918.

No. 84–1736. HIJAR, SUPERINTENDENT, FEDERAL PRISON CAMP AT BORON, CALIFORNIA *v.* BURRUS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 743 F. 2d 693.

No. 84–1865. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS *v.* MCCREE. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 758 F. 2d 226.

No. 84–1974. ROSE, WARDEN *v.* CLARK. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 2 presented by the petition. Reported below: 762 F. 2d 1006.

No. 84–1999. LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL–CIO, C. L. C. *v.* CITY OF CLEVELAND ET AL. C. A. 6th Cir. Certiorari granted and case set for oral argument in tandem with No. 84–1656, *Local 28 of Sheet Metal Workers* v. *EEOC*, *supra*. Reported below: 753 F. 2d 479.

No. 85–202. OFFSHORE LOGISTICS, INC., ET AL. *v.* TALLENTIRE ET AL. C. A. 5th Cir. Motions of Sonat Offshore Drilling, Inc., et al. and Maritime Law Association of the United States for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 754 F. 2d 1274.

No. 85–5023. POLAND *v.* ARIZONA; and

No. 85–5024. POLAND *v.* ARIZONA. Sup. Ct. Ariz. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted in No. 85–5023 limited to Question 1 presented by the petition. Certiorari granted in No. 85–5024. Cases consolidated and a total of one hour allotted for oral argument. Reported below: No. 85–5023, 144 Ariz. 388, 698 P. 2d 183; No. 85–5024, 144 Ariz. 412, 698 P. 2d 207.

Certiorari Denied. (See also Nos. 84–1824, 84–1835, 84–1860, 84–1902, 84–1945, 84–1968, 84–6832, 84–6856, 84–6961, 85–92, 85–95, 85–102, 85–116, 85–134, 85–5007, 85–5148, 84–1891, and 84–6923, *supra*.)

No. 84–1459. HERNANDEZ-CARTAYA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 1390.

No. 84–1508. HARVIS CONSTRUCTION, INC., ET AL. *v.* UNITED STATES EX REL. MARTIN STEEL CONSTRUCTORS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 750 F. 2d 759.

No. 84–1522. DUFRESNE *v.* BAER, CHAIRMAN, UNITED STATES PAROLE COMMISSION, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 744 F. 2d 1543.

No. 84–1526. QUINN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 84–1534. LUTJEHARMS, COMMISSIONER OF EDUCATION OF NEBRASKA, ET AL. *v.* ROSE, AS NEXT FRIEND OF ROSE. C. A. 8th Cir. Certiorari denied. Reported below: 748 F. 2d 1258.

No. 84–1550. SMITH ET AL., INDIVIDUALLY AND DBA SHARP-EYE ENTERPRISES *v.* GOLDEN WEST BROADCASTERS, INC., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84–1564. MONICK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1085.

No. 84–1613. HUEBNER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 752 F. 2d 1235.

No. 84–1621. OCCIDENTAL OIL SHALE, INC. *v.* STATE BOARD OF LAND COMMISSIONERS OF COLORADO ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 692 P. 2d 321.

No. 84–1625. CAPITAL CITY PRESS, INC. *v.* BURATT. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 459 So. 2d 1268.

No. 84–1642. KRODEL *v.* YOUNG, ASSOCIATE COMMISSIONER, OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 242 U. S. App. D. C. 11, 748 F. 2d 701.

No. 84–1646. BENZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 903.

No. 84–1654. LAVELLE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 243 U. S. App. D. C. 47, 751 F. 2d 1266.

No. 84–1666. CUMMINGS *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 810.

No. 84–1671. ZEILER ET AL. *v.* OHIO HIGH SCHOOL ATHLETIC ASSN. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 934.

No. 84–1679. NOBLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 754 F. 2d 1324.

No. 84–1681. MASTER PRINTERS OF AMERICA *v.* BROCK, SECRETARY OF LABOR. C. A. 4th Cir. Certiorari denied. Reported below: 751 F. 2d 700.

No. 84–1683. DOBEY ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 751 F. 2d 1140.

No. 84–1702. H. F. ALLEN ORCHARDS ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 749 F. 2d 1571.

No. 84–1710. BELLE FOURCHE PIPELINE CO. ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 751 F. 2d 332.

No. 84–1729. SATTERFIELD ET AL. *v.* HUEBNER ET UX. Ct. App. Wash. Certiorari denied. Reported below: 38 Wash. App. 66, 684 P. 2d 752.

No. 84–1748. HEBERT *v.* UNITED STATES;
No. 84–1812. ANTONE *v.* UNITED STATES;
No. 84–1864. AMUNY *v.* UNITED STATES; and
No. 84–1878. MAXWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 753 F. 2d 1301.

No. 84–1759. T. G. & Y. STORES, INC. *v.* LUSBY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 749 F. 2d 1423.

No. 84–1765. NEAL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 689 S. W. 2d 420.

No. 84–1770. WACO FINANCIAL, INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 831.

No. 84–1771. NILSON VAN & STORAGE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 755 F. 2d 362.

No. 84–1772. KARMUN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 567.

No. 84–1774. EWERT *v.* EXXON CO., USA, A DIVISION OF EXXON CORP., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 755 F. 2d 935.

No. 84–1775. CORONEL-QUINTANA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 752 F. 2d 1284.

No. 84–1776. HANCHARIK *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 84–1778. FISHER *v.* UNITED STATES; and
No. 84–6972. WHEELINGS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 757 F. 2d 1359.

No. 84–1779. PENNSYLVANIA ET AL. *v.* DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 38.

No. 84–1780. MCMAHON, CALIFORNIA DIRECTOR OF SOCIAL SERVICES *v.* GREEN ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 161 Cal. App. 3d 678, 207 Cal. Rptr. 830.

No. 84–1781. ALL AMERICAN LIFE & CASUALTY CO. *v.* OCEANIC TRADE ALLIANCE COUNCIL INTERNATIONAL, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 756 F. 2d 474.

No. 84–1784. GRYNBERG ET AL. *v.* DANZIG ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 161 Cal. App. 3d 1128, 208 Cal. Rptr. 336.

No. 84–1788. INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AFL–CIO *v.* NATIONAL ELEVATOR INDUSTRY, INC. C. A. 2d Cir. Certiorari denied. Reported below: 760 F. 2d 253.

No. 84–1792. SWEATER BEE BY BANFF, LTD. *v.* MANHATTAN INDUSTRIES, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 754 F. 2d 457.

No. 84–1795. TECHNOGRAPH, INC. *v.* GENERAL MOTORS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 749 F. 2d 1020.

No. 84–1798. COLLINS *v.* ANNDEP STEAMSHIP CORP. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 256.

No. 84–1799. FRENCH *v.* MEAD PAPER CORP., FORMS PAPER DIVISION. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 652.

No. 84–1801. INUPIAT COMMUNITY OF THE ARCTIC SLOPE ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 570.

No. 84–1802. EARL'S PUMP & SUPPLY CO., INC., ET AL. *v.* COLBERG, INC. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 162 Cal. App. 3d 322, 208 Cal. Rptr. 465.

No. 84–1807. GROCERY MANUFACTURERS OF AMERICA, INC. *v.* GERACE, COMMISSIONER, NEW YORK DEPARTMENT OF AGRICULTURE AND MARKETS, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 993.

No. 84–1814. MEADOWS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 64 N. Y. 2d 956, 477 N. E. 2d 1097.

No. 84–1816. SMITH *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 84–1819. AVONDALE SHIPYARDS, INC. *v.* ROSETTI. C. A. 5th Cir. Certiorari denied. Reported below: 746 F. 2d 294.

No. 84–1822. KERPELMAN *v.* LAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 753 F. 2d 1071.

No. 84–1823. ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND *v.* COOLEY. Sup. Ct. Miss. Certiorari denied. Reported below: 462 So. 2d 696.

No. 84–1827. SIMONE *v.* GOLDEN NUGGET HOTEL & CASINO, T/A G. N. A. C. CORP. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 261.

No. 84–1828. RADER *v.* WISCONSIN BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY. Sup. Ct. Wis. Certiorari denied. Reported below: 121 Wis. 2d 410, 359 N. W. 2d 156.

No. 84–1829. ILLINOIS COMMERCE COMMISSION ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir.

Certiorari denied. Reported below: 242 U. S. App. D. C. 197, 749 F. 2d 875.

No. 84-1830. LIBERTY NATIONAL BANK & TRUST COMPANY OF LOUISVILLE, FDBA UNITED KENTUCKY BANK, INC. *v.* GEORGE ET UX. C. A. 6th Cir. Certiorari denied. Reported below: 753 F. 2d 50.

No. 84-1831. JONES *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84-1833. DRAPE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 753 F. 2d 660.

No. 84-1834. BISHOP *v.* INTERNATIONAL PAPER CO. ET AL. Ct. App. Ga. Certiorari denied. Reported below: 173 Ga. App. 34, 325 S. E. 2d 870.

No. 84-1836. DUNN *v.* MEARLS ET AL. C. A. 1st Cir. Certiorari denied.

No. 84-1840. WOODRUM *v.* SOUTHERN RAILWAY CO. C. A. 11th Cir. Certiorari denied. Reported below: 750 F. 2d 876.

No. 84-1844. BURRISS *v.* NORTHERN ASSURANCE COMPANY OF AMERICA. Sup. Ct. Kan. Certiorari denied. Reported below: 236 Kan. 326, 691 P. 2d 10.

No. 84-1846. THOMAS ET AL. *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 14 Ark. App. xviii.

No. 84-1847. LANDES *v.* DEPARTMENT OF JUSTICE. C. A. D. C. Cir. Certiorari denied.

No. 84-1848. KOUTSOUBOS, ADMINISTRATOR OF THE ESTATE OF KOUTSOUBOS *v.* BOEING VERTOL, DIVISION OF BOEING CO., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 352.

No. 84-1849. KEARNS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 178.

No. 84-1853. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 2d 566.

No. 84-1854. NORTHERN OIL CO., INC., ET AL. *v.* STANDARD OIL COMPANY OF CALIFORNIA ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 761 F. 2d 699.

No. 84–1855. STEINES *v.* ROCK ISLAND ARSENAL DEPARTMENT OF ARMY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1078.

No. 84–1856. DAIRYMEN, INC. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 654.

No. 84–1858. LEX TEX LTD. INC. *v.* J. P. STEVENS & CO., INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 747 F. 2d 1553.

No. 84–1861. WIVORKOSKI *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied.

No. 84–1866. DI GILIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 924.

No. 84–1868. PENNZOIL CO. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 327 S. E. 2d 444.

No. 84–1871. HOROWITZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 756 F. 2d 1400.

No. 84–1873. WEIDE *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 157.

No. 84–1874. BEEKER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1080.

No. 84–1876. TRANSCO EXPLORATION CO., INC. *v.* ROWAN COS., INC. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. Reported below: 679 S. W. 2d 660.

No. 84–1879. CITY OF SUGAR LAND ET AL. *v.* SIGNAD, INC. C. A. 5th Cir. Certiorari denied. Reported below: 753 F. 2d 1338.

No. 84–1883. MCCLINTOCK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 748 F. 2d 1278.

No. 84–1884. GONZALEZ-RIOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 720 F. 2d 685.

No. 84–1885. HERIER-DARCHERIEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 762 F. 2d 1019.

No. 84–1886. GARRETT *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 8 Ark. App. xv.

No. 84–1887. CLOPPER *v.* MERRILL LYNCH RELOCATION MANAGEMENT, INC. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 36.

No. 84–1888. MGPC, INC. *v.* DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 763 F. 2d 422.

No. 84–1889. MERWINE *v.* BOARD OF TRUSTEES FOR STATE INSTITUTIONS OF HIGHER LEARNING ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 754 F. 2d 631.

No. 84–1890. CARDINAL RESOURCES, INC. *v.* EDDIE STEAMSHIP CO., LTD., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 757 F. 2d 282.

No. 84–1892. CICIRELLO *v.* NEW YORK TELEPHONE CO. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 990.

No. 84–1893. LA-Z-BOY CHAIR CO. *v.* WORLD OF SLEEP, INC.; and

No. 85–64. WORLD OF SLEEP, INC. *v.* LA-Z-BOY CHAIR CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 756 F. 2d 1467.

No. 84–1895. EDWARDS ET AL. *v.* HANNON, JUDGE, SUPERIOR COURT OF THE DISTRICT OF COLUMBIA; and SOWELLS ET AL. *v.* HANNON, JUDGE, SUPERIOR COURT OF THE DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 84–1896. QUICK ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84–1897. ROLLESTON *v.* SEA ISLAND PROPERTIES, INC., ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 254 Ga. 183, 327 S. E. 2d 489.

No. 84–1900. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 753 F. 2d 1072.

No. 84–1908. ONEIDA INDIAN NATION OF WISCONSIN *v.* HOUDENOSAUNEE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 757 F. 2d 19.

No. 84–1909. BROWN *v.* ERMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 372.

No. 84–1910. WILLIAMS *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 491 A. 2d 1129.

No. 84–1911. WHEELER *v.* MENTAL HEALTH AND MENTAL RETARDATION AUTHORITY OF HARRIS COUNTY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 752 F. 2d 1063.

No. 84–1912. LANGENEGGER ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 756 F. 2d 1565.

No. 84–1915. F. E. L. PUBLICATIONS, LTD. *v.* CATHOLIC BISHOP OF CHICAGO. C. A. 7th Cir. Certiorari denied. Reported below: 754 F. 2d 216.

No. 84–1916. BOLLING *v.* BAKER. Ct. App. Tex., 4th Sup. Jud. Dist. Certiorari denied. Reported below: 671 S. W. 2d 559.

No. 84–1917. JOHNS *v.* SUPREME COURT OF OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 753 F. 2d 524.

No. 84–1918. FELT ET AL. *v.* FIRST BANK OF SOUTH DAKOTA. C. A. 8th Cir. Certiorari denied. Reported below: 745 F. 2d 62.

No. 84–1920. PFLUGER *v.* INTERNAL REVENUE SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 1291.

No. 84–1924. CITY OF POMPANO BEACH *v.* CAPALBO. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 455 So. 2d 468.

No. 84–1926. REID ET AL. *v.* GHOLSON ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 229 Va. 179, 327 S. E. 2d 107.

No. 84–1927. MILLER *v.* HENRY ET AL. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 84–1931. HEISER *v.* HEISER. Ct. App. N. C. Certiorari denied. Reported below: 71 N. C. App. 223, 321 S. E. 2d 479.

No. 84–1932. SKLUT HIDE & FURS *v.* PRUDENTIAL LINES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 923.

No. 84–1934. COPY-DATA SYSTEMS, INC., ET AL. *v.* TOSHIBA AMERICA, INC. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 293.

No. 84–1935. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. *v.* BROCK, SECRETARY OF LABOR. C. A. D. C. Cir. Certiorari denied. Reported below: 241 U. S. App. D. C. 122, 746 F. 2d 855.

No. 84–1937. SWAIM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 757 F. 2d 1530.

No. 84–1940. DOW *v.* UNITED VAN LINES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 256.

No. 84–1943. WOODS *v.* TSUCHIYA. C. A. Fed. Cir. Certiorari denied. Reported below: 754 F. 2d 1571.

No. 84–1946. PORTER *v.* O'FARRELL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 922.

No. 84–1949. LAMONT, ADMINISTRATOR OF THE ESTATE OF LAMONT *v.* WOLF ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84–1950. HAMPTON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 164 Cal. App. 3d 27, 209 Cal. Rptr. 905.

No. 84–1951. SOUTHLAND CORP. *v.* UNITED STATES; and
No. 84–1981. MASTROPIERI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 760 F. 2d 1366.

No. 84–1953. MARCON, LTD. *v.* HELENA RUBINSTEIN, INC. (two cases). C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 999 (second case).

No. 84–1954. MANKIN *v.* OHIO. Ct. App. Ohio, Ross County. Certiorari denied.

No. 84–1956. D. L. AULD CO. *v.* CHROMA-GRAPHICS CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 753 F. 2d 1029.

No. 84–1959. JAMES *v.* ALABAMA STATE PERSONNEL BOARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 744 F. 2d 95.

No. 84–1960. WELCKER *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 752 F. 2d 1577.

No. 84–1961. WOLF ET UX. *v.* RICHMOND COUNTY HOSPITAL AUTHORITY. C. A. 4th Cir. Certiorari denied. Reported below: 745 F. 2d 904.

No. 84–1962. JOHNSON *v.* TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 375.

No. 84–1963. R. O. GIVENS SIGNS, INC. *v.* TOWN OF NAGS HEAD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 648.

No. 84–1964. TERRY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 469 So. 2d 1359.

No. 84–1965. CHRISTIAN *v.* VETERANS ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 159.

No. 84–1967. INDEPENDENT NEWS, INC., ET AL. *v.* BANK OF OREGON ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 298 Ore. 434, 693 P. 2d 35.

No. 84–1975. CASTALDI *v.* UNITED STATES; and
No. 84–1982. TUFARO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 991.

No. 84–1977. BERKIC *v.* CRICHTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 761 F. 2d 1289.

No. 84–1983. TSAI *v.* LI ET UX. Ct. App. D. C. Certiorari denied.

No. 84–1984. GROVE ET AL. *v.* MEAD SCHOOL DISTRICT NO. 354 ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1528.

No. 84–1985. CITY OF EUCLID, OHIO *v.* MABEL ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 19 Ohio App. 3d 235, 484 N. E. 2d 249.

No. 84–1986. FINE ET AL. *v.* BELLEFONTE UNDERWRITERS INSURANCE CO. C. A. 2d Cir. Certiorari denied. Reported below: 758 F. 2d 50.

No. 84–1987. MOORE *v.* BONNER, SUPERINTENDENT OF SCHOOLS FOR BERKELEY COUNTY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 648.

No. 84–1988. SCHUBERT *v.* RICHARDSON SECURITIES OF CANADA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 991.

No. 84–1989. SHORTER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SHORTER *v.* DRURY ET UX. Sup. Ct. Wash. Certiorari denied. Reported below: 103 Wash. 2d 645, 695 P. 2d 116.

No. 84–1991. FOLAK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 828.

No. 84–1993. HYDE *v.* VAN WORMER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 765 F. 2d 86.

No. 84–1994. LONDON *v.* MANHATTAN LIFE CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 648.

No. 84–1995. SMITH INTERNATIONAL, INC. *v.* HUGHES TOOL CO. C. A. Fed. Cir. Certiorari denied. Reported below: 759 F. 2d 1572.

No. 84–1997. BOBIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 127 Ill. App. 3d 1158, 483 N. E. 2d 727.

No. 84–1998. NEW YORK STATE NURSES ASSN. *v.* ST. JOSEPH'S HOSPITAL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 260.

No. 84–2000. NOKES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 20.

No. 84–2001. COLLARD ET AL. *v.* INCORPORATED VILLAGE OF FLOWER HILL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 759 F. 2d 205.

No. 84–2002. BRUNER *v.* PARKER. Sup. Ct. Mo. Certiorari denied. Reported below: 683 S. W. 2d 265.

No. 84–2003. ETTER *v.* COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. Fed. Cir. Certiorari denied. Reported below: 756 F. 2d 852.

No. 84–2004. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* MISSOURI STATE HIGHWAY PATROL ET AL.; and

No. 85–42. PRICE *v.* WHITMER, SUPERINTENDENT, MISSOURI STATE HIGHWAY PATROL, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 748 F. 2d 447.

No. 84–2006. JOHNSON ET UX. *v.* RIGHETTI ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 756 F. 2d 738.

No. 84–2007. THOMPSON *v.* UNITED STATES (two cases). C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 995.

No. 84–2010. MEADOWS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 84–2012. BRAND *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 106 App. Div. 2d 260, 484 N. E. 2d 388.

No. 84–2014. FLORES *v.* SOUTHERN PACIFIC TRANSPORTATION CO. ET AL. Ct. App. Tex., 6th Sup. Jud. Dist. Certiorari denied. Reported below: 683 S. W. 2d 31.

No. 84–2017. PALMER *v.* CITY OF SEATTLE. Sup. Ct. Wash. Certiorari denied.

No. 84–2019. BARNEY *v.* HALPERIN, STATE TAX ASSESSOR. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 490 A. 2d 223.

No. 84–2020. PURSUE ENERGY CORP. ET AL. *v.* BERRY. Sup. Ct. Miss. Certiorari denied. Reported below: 463 So. 2d 1031.

No. 84–2021. MCGREEVY *v.* DANNON CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 914.

No. 84–2024. SNAER *v.* TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 1341.

No. 84–2025. MONON SHIPPERS ASSN., INC., ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 7th Cir. Certiorari denied.

No. 84–2029. GASPARRO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 194 Conn. 96, 480 A. 2d 509.

No. 84-2031. MEIRI *v.* DACON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 759 F. 2d 989.

No. 84-2033. HAMMOND *v.* RAPIDES PARISH SCHOOL BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 755 F. 2d 171.

No. 84-2036. EL SHAHAWY *v.* SARASOTA COUNTY PUBLIC HOSPITAL BOARD. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 467 So. 2d 1006.

No. 84-6422. BRITT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 32.

No. 84-6427. CARSON *v.* SPANISH LAKE ASSN. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 745 F. 2d 63.

No. 84-6444. MCMULLEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 65.

No. 84-6465. RUTH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 663 S. W. 2d 844.

No. 84-6477. MAULDIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 376.

No. 84-6487. HUTCHINGS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 751 F. 2d 230.

No. 84-6501. MCALLISTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 747 F. 2d 1273.

No. 84-6506. BEWLEY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 695 P. 2d 1357.

No. 84-6509. KEITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 754 F. 2d 1388.

No. 84-6510. KEMP *v.* UNITED STATES;
No. 84-6541. MERIDA *v.* UNITED STATES;
No. 84-6561. TOLER *v.* UNITED STATES;
No. 84-6585. BARNHILL *v.* UNITED STATES; and
No. 84-6592. TAYLOR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 995.

No. 84-6513. DIXON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 654.

No. 84-6516. WILLIAMS *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 753 F. 2d 1072.

No. 84-6517. FLYNN *v.* SHULTZ, SECRETARY OF STATE. C. A. 7th Cir. Certiorari denied. Reported below: 748 F. 2d 1186.

No. 84-6528. JAMISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1084.

No. 84-6531. PATTERSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 1299.

No. 84-6560. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 774 F. 2d 1153.

No. 84-6562. WHITAKER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 64 N. Y. 2d 347, 476 N. E. 2d 294.

No. 84-6584. PEPPER *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 686 S. W. 2d 53.

No. 84-6594. SPANN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 606.

No. 84-6598. KNOBLAUCH ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 749 F. 2d 200 and 752 F. 2d 125.

No. 84-6603. IANNACCIO *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 505 Pa. 414, 480 A. 2d 966.

No. 84-6604. LOPEZ *v.* DALLAS OFFSET, INC. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 1463.

No. 84-6615. JONES *v.* JONES, SUPERINTENDENT, GREAT MEADOWS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 914.

No. 84-6659. JARRAD *v.* UNITED STATES; and
No. 85-5029. MCMANAMY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 754 F. 2d 1451.

No. 84-6676. BATES *v.* KERR ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1077.

No. 84-6679. ESTRADA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 128.

No. 84-6682. CORLEY *v.* HERMAN, CLERK, DISTRICT OF COLUMBIA COURT OF APPEALS, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 84-6691. WILSON *v.* RAYL, DIRECTOR, EL DORADO HONOR CAMP, ET AL. C. A. 10th Cir. Certiorari denied.

No. 84-6697. WIGGINS *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied.

No. 84-6702. HARVEY *v.* UNITED STATES; and
No. 84-6835. CLARK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 756 F. 2d 636.

No. 84-6703. BRANTNER *v.* WICKER, ACTING SUPERINTENDENT OF PRISONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 255.

No. 84-6704. CUNNINGHAM *v.* SHAFER. Sup. Ct. Nev. Certiorari denied. Reported below: 101 Nev. 947.

No. 84-6707. HUMPHRIES *v.* CHESAPEAKE CITY POLICE DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1471.

No. 84-6708. BLOCKER *v.* FETHERSTON. Sup. Ct. Mich. Certiorari denied. Reported below: 419 Mich. 961.

No. 84-6711. KORB *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 332 Pa. Super. 642, 481 A. 2d 1374.

No. 84-6712. LEROY *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 757 F. 2d 94.

No. 84-6718. JEFFERSON *v.* MERCER, CLERK, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 696.

No. 84-6719. GONZALEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 866.

No. 84-6720. CUNNINGHAM *v.* CITY OF LAS VEGAS. Sup. Ct. Nev. Certiorari denied. Reported below: 100 Nev. 806.

No. 84-6724. PANDO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 84-6730. BASKERVILLE *v.* BAKER, WARDEN, ET AL. Sup. Ct. Va. Certiorari denied.

No. 84-6734. SOTO ET AL. *v.* UNITED STATES;
No. 84-6739. CONTRERAS *v.* UNITED STATES; and
No. 84-6751. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 755 F. 2d 733.

No. 84-6735. HERNANDEZ *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 755 F. 2d 171.

No. 84-6737. FRITZ *v.* MARSH, SECRETARY OF THE ARMY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 765.

No. 84-6741. KOSYLA *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 129 Ill. App. 3d 685, 472 N. E. 2d 1207.

No. 84-6743. DAVID *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-6745. VELILLA *v.* UTC/HAMILTON STANDARD DIVISION, LIBERTY MUTUAL INSURANCE CO., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 373.

No. 84-6749. WILLIAMS *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 84-6750. BUTLER *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 84-6752. DENNIS *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 992.

No. 84-6754. CODER *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 256.

No. 84-6757. ALEEM *v.* SPIGNER ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84-6758. ALEEM *v.* MUNICIPAL COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84–6761. MANZUR *v.* McCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 84–6764. RICHARDS *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied.

No. 84–6765. NEWMAN *v.* BAKKO. C. A. 7th Cir. Certiorari denied.

No. 84–6767. CHAMBERS *v.* ARMSTRONG BLUM MFG. CO. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 1292.

No. 84–6768. ZLOMKE *v.* FLYING TIGER LINE, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 661.

No. 84–6772. DOLPHIN *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 195 Conn. 444, 488 A. 2d 812.

No. 84–6773. GAMEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 84–6774. CHOU *v.* CAPITAL CIGAR & TOBACCO CO., INC. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 646.

No. 84–6775. CODY *v.* SOLEM, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 755 F. 2d 1323.

No. 84–6776. LEE *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 990.

No. 84–6779. INGE *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 1010.

No. 84–6785. STRADER *v.* KEITH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 755 F. 2d 930.

No. 84–6787. YOUNG *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 130 Ill. App. 3d 117, 473 N. E. 2d 974.

No. 84-6788. MARTIN *v.* LITTLE, BROWN & CO. ET AL. C. A. D. C. Cir. Certiorari denied.

No. 84-6789. RATNER *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO, ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84-6793. HANSEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 755 F. 2d 629.

No. 84-6794. GLICK *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 378.

No. 84-6795. STRADER *v.* ALLSBROOK, SUPERINTENDENT, ODOM CORRECTIONAL COMPLEX, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 649.

No. 84-6797. BIXLER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 471 N. E. 2d 1093.

No. 84-6799. CARRIGAN *v.* LASHLEY. C. A. D. C. Cir. Certiorari denied. Reported below: 245 U. S. App. D. C. Cir. 233, 759 F. 2d 959.

No. 84-6801. DARWIN *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 753 F. 2d 1086.

No. 84-6802. ALLEN *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 161.

No. 84-6803. DARR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 2d 595.

No. 84-6804. BOGGINS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 243 U. S. App. D. C. 17, 750 F. 2d 1093.

No. 84-6805. HUBBARD ET AL. *v.* WHITE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 755 F. 2d 692.

No. 84-6806. GORMONG *v.* LOCAL 613, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 174.

No. 84-6809. REEVES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 752 F. 2d 995.

No. 84-6810. WHIDDON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 2d 648.

No. 84-6812. ROACH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 1252.

No. 84-6813. SHEPPARD ET UX. *v.* ERMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 375.

No. 84-6815. BRODIS *v.* DETROIT PUBLIC SCHOOL ADMINISTRATORS ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 419 Mich. 939.

No. 84-6816. LIKAKUR *v.* KING COUNTY SUPERIOR COURT ET AL. Sup. Ct. Wash. Certiorari denied.

No. 84-6818. COOMBS *v.* MCGARRY ET AL. C. A. 3d Cir. Certiorari denied.

No. 84-6819. ARNOLD *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 84-6820. KANE *v.* EDWARDS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 653.

No. 84-6824. SPAN *v.* DELAINE. C. A. 11th Cir. Certiorari denied.

No. 84-6827. ROSS *v.* MAYFIELD, SUPERINTENDENT, FULTON STATE HOSPITAL. C. A. 8th Cir. Certiorari denied.

No. 84-6829. MOSES *v.* MARATHON OIL CO. C. A. 5th Cir. Certiorari denied. Reported below: 749 F. 2d 262.

No. 84-6830. COLSON *v.* BOARD OF REGENTS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 1292.

No. 84-6834. CANTONE *v.* SCULLY, SUPERINTENDENT, NEW YORK CORRECTIONAL FACILITY AT GREEN HAVEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 759 F. 2d 207.

No. 84-6836. ADAMS *v.* GRAHAM ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 655.

No. 84-6837. HARROD *v.* CITY OF LINCOLN, NEBRASKA, ET AL. C. A. 8th Cir. Certiorari denied.

No. 84-6839. HEREDIA-FERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 756 F. 2d 1412.

No. 84-6840. SEATON *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 366.

No. 84-6844. WILLIAMS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 84-6847. CARTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 658.

No. 84-6849. DARWIN *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 285.

No. 84-6850. HOLLOWAY *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 252.

No. 84-6851. BETKA *v.* CITY OF WEST LINN ET AL. C. A. 9th Cir. Certiorari denied.

No. 84-6853. BONDI *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 130 Ill. App. 3d 536, 474 N. E. 2d 733.

No. 84-6855. REED *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 756 F. 2d 654.

No. 84-6857. REED *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 1292.

No. 84-6858. SIMS *v.* BABCOCK & WILCOX CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 753 F. 2d 1570.

No. 84-6860. IN RE WALKER. Sup. Ct. Cal. Certiorari denied.

No. 84-6862. BROWN *v.* LEAVITT, SHERIFF, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 753 F. 2d 1070.

No. 84-6863. HORNE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 755 F. 2d 691.

No. 84-6867. HASSAIN *v.* NEWBLATT, JUDGE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1007.

No. 84–6868. VALENTINO *v.* SUPERIOR COURT OF THE COUNTY OF CONTRA COSTA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 84–6869. MERRILL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 84–6870. CORLEY *v.* MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 245 U. S. App. D. C. Cir. 233, 759 F. 2d 959.

No. 84–6871. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 759 F. 2d 633.

No. 84–6874. TILLIS *v.* DAVIS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 84–6875. WADE *v.* FRONTIER PROPERTIES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 2d 880.

No. 84–6876. GRIFFITH ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 756 F. 2d 1244.

No. 84–6877. BOWERS *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 123 Wis. 2d 541, 367 N. W. 2d 243.

No. 84–6878. JENNELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 1302.

No. 84–6880. BUNKER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 84–6882. CLEMMONS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 469 So. 2d 1324.

No. 84–6883. GREER *v.* BLACK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 758 F. 2d 327.

No. 84–6885. UNANGST *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 333 Pa. Super. 633, 482 A. 2d 670.

No. 84–6886. MORLAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 756 F. 2d 1442.

No. 84–6887. RADOGNA *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 333 Pa. Super. 632, 482 A. 2d 669.

No. 84–6889. OWENS *v.* FREEMAN, SUPERINTENDENT, PENNSYLVANIA CORRECTIONAL INSTITUTION AT CAMP HILL, ET AL. C. A. 3d Cir. Certiorari denied.

No. 84–6890. JACKSON *v.* OKLAHOMA ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 699 P. 2d 1094.

No. 84–6891. DIAL ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 163.

No. 84–6893. WILLIAMS *v.* KIMMELMAN, ATTORNEY GENERAL OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 84–6896. FISHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1012.

No. 84–6897. VINCENT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 379.

No. 84–6898. MOCK *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 84–6900. HOBBS *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 752 F. 2d 1079.

No. 84–6901. BOWRING *v.* MILLS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 645.

No. 84–6902. ZELTNER *v.* FAUVER, COMMISSIONER, NEW JERSEY DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 84–6904. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 20.

No. 84–6906. MORENO-SEVANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 696.

No. 84–6908. DARWIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 84–6909. SMITH *v.* DEROBERTIS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 758 F. 2d 1151.

No. 84–6912. SIMONS *v.* DIETZ ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 765 F. 2d 139.

No. 84–6915. KIRK *v.* REES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 57.

No. 84-6916. RAGIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 696.

No. 84-6917. MCALLISTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 761 F. 2d 693.

No. 84-6920. BAKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 270.

No. 84-6922. CAWLEY *v.* BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 931.

No. 84-6924. DELBRIDGE *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 84-6925. HEARRON *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 10 Kan. App. 2d 229, 696 P. 2d 418.

No. 84-6926. HART *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 285.

No. 84-6927. ANDINO *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied.

No. 84-6928. KADOTA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 757 F. 2d 198.

No. 84-6929. OWENS *v.* LUTHER, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 84-6930. OLINGER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 759 F. 2d 1293.

No. 84-6933. MITCHELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 84-6934. HACKLEY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 1000.

No. 84-6936. HAWKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 1000.

No. 84-6937. TAMAYO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 277.

No. 84–6939. BLAIR, DBA BLAIRCO, INC. *v.* CHAFIN, DBA H. TRUMAN CHAFIN LEGAL CORP. C. A. 4th Cir. Certiorari denied. Reported below: 755 F. 2d 926.

No. 84–6942. TRAVIS *v.* UNITED STATES; and
No. 85–5111. TRAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 657.

No. 84–6943. MAZAK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 84–6944. RANDALL *v.* KELLEHER, JUDGE, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 84–6945. HUNT *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 22 Ohio App. 3d 43, 488 N. E. 2d 901.

No. 84–6947. CLARK *v.* BYRON JACKSON PUMP CO. ET AL. C. A. 10th Cir. Certiorari denied.

No. 84–6948. FIGUEROA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 757 F. 2d 466.

No. 84–6950. DUCHER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 245 U. S. App. D. C. 234, 759 F. 2d 960.

No. 84–6951. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1012.

No. 84–6954. CAMPBELL *v.* OHIO DEPARTMENT OF JUSTICE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1006.

No. 84–6955. DAVENPORT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 147.

No. 84–6956. ADAMS *v.* LYKES BROTHERS STEAMSHIP CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 760 F. 2d 267.

No. 84–6957. AUGUSTYNIAK *v.* KOCH, MAYOR OF THE CITY OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 794 F. 2d 676.

No. 84–6958. ROBINSON *v.* COOKE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-6963. HOOSMAN *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 84-6964. GUTHRIE *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 84-6965. CHATMAN *v.* MARQUEZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 754 F. 2d 1531.

No. 84-6966. GRISSO *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 84-6967. BARALDINI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 758 F. 2d 843.

No. 84-6968. ACCORDINO *v.* BOARD OF REVIEW, OHIO BUREAU OF EMPLOYMENT SERVICES, ET AL. Ct. App. Ohio, Trumbull County. Certiorari denied.

No. 84-6969. BARTON *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 84-6973. ODINGA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 758 F. 2d 843.

No. 84-6976. BRAY *v.* BEARDEN ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-6977. GREER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1012.

No. 84-6978. GILBERT *v.* CALIFORNIA STATE PERSONNEL BOARD ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 84-6979. CRAIG *v.* TUSCALOOSA NEWS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 659.

No. 84-6984. LIGHTSEY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 84-6985. CASTANEDA *v.* CHRISTENSEN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 274.

No. 84-6987. RASULLAH, AKA BARNES *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 136.

No. 84-6988. McGIFFEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 763 F. 2d 368.

No. 84-6989. ORNSBEY, A MINOR, BY HIS GUARDIAN AD LITEM, ORNSBEY, ET AL. *v.* CITY OF TULARE ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 84-6990. CARRION *v.* NEW YORK CITY HEALTH AND HOSPITALS CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 370.

No. 84-6991. HARRIS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 688 S. W. 2d 338.

No. 84-6992. HUNTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 1000.

No. 84-6995. ROBINSON *v.* ENGLE, DEPUTY DIRECTOR, CORRECTIONAL PROGRAMS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1011.

No. 84-6996. OWENS *v.* BAER. C. A. 2d Cir. Certiorari denied.

No. 84-6998. THOMAS *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 664 S. W. 2d 56.

No. 84-6999. REED *v.* OREGON WORKERS' COMPENSATION BOARD ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 298 Ore. 597, 695 P. 2d 50.

No. 84-7001. HAYES ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 763 F. 2d 368.

No. 84-7004. TATE *v.* COOKE, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 174.

No. 84-7007. BROWN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 182.

No. 85-2. ALLEN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 506 Pa. 500, 486 A. 2d 363.

No. 85-6. ZUCKER ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 637.

No. 85-7. NAPOLITANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 761 F. 2d 135.

No. 85–9. TEXAS *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 2d 419.

No. 85–11. RAPHAN ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 759 F. 2d 879.

No. 85–13. LUCCI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 153.

No. 85–14. THOMAS *v.* GENERAL SERVICES ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 756 F. 2d 86.

No. 85–15. BOGARD *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 687 S. W. 2d 533.

No. 85–16. EDWARDS ET AL. *v.* WILKES-BARRE PUBLISHING CO. PENSION TRUST ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 757 F. 2d 52.

No. 85–20. MORGAN ADHESIVES CO. *v.* CHEMTROL ADHESIVES, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 158.

No. 85–22. PIGGY BANK STATIONS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 755 F. 2d 450.

No. 85–25. MORGAN *v.* FIRESTONE TIRE & RUBBER CO. C. A. 11th Cir. Certiorari denied. Reported below: 756 F. 2d 884.

No. 85–26. ROL MFG. CO. ET AL. *v.* NICKSON INDUSTRIES, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 160.

No. 85–28. REDCO CORP. *v.* CBS, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 758 F. 2d 970.

No. 85–29. EWP CORP. ET AL. *v.* RELIANCE UNIVERSAL, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 755 F. 2d 898.

No. 85–30. TIERNEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 760 F. 2d 382.

No. 85–32. C & C METAL PRODUCTS CORP. ET AL. *v.* DEFIANCE BUTTON MACHINE CO. C. A. 2d Cir. Certiorari denied. Reported below: 759 F. 2d 1053.

No. 85–33. HEWITT, PERSONAL REPRESENTATIVE OF THE ESTATE OF HEWITT, ET AL. *v.* CITY OF TRUTH OR CONSEQUENCES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 758 F. 2d 1375.

No. 85–36. CEASAR *v.* MERRILL LYNCH & CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 135.

No. 85–38. MEACHUM *v.* WORTHEN BANK & TRUST CO., N. A. Ct. App. Ark. Certiorari denied. Reported below: 13 Ark. App. 229, 682 S. W. 2d 763.

No. 85–39. WILLIAMS *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 14 Ark. App. 32, 684 S. W. 2d 821.

No. 85–40. MASSACHUSETTS HOSPITAL SCHOOL ET AL. *v.* STOCK, BY AND THROUGH HIS FATHER AND NEXT FRIEND, STOCK. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 392 Mass. 205, 467 N. E. 2d 448, and 394 Mass. 437, 476 N. E. 2d 210.

No. 85–41. WESTIN, INC. *v.* BLC INSURANCE CO. Ct. App. Minn. Certiorari denied. Reported below: 359 N. W. 2d 752.

No. 85–45. SANDERS *v.* MISSISSIPPI STATE BAR ASSN. Sup. Ct. Miss. Certiorari denied. Reported below: 466 So. 2d 891.

No. 85–48. SUAREZ *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 1st Cir. Certiorari denied. Reported below: 755 F. 2d 1.

No. 85–49. PACELLA *v.* MILFORD RADIO CORP., DBA RADIO STATION WMRC, ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 394 Mass. 1051, 476 N. E. 2d 595.

No. 85–60. WEST GULF MARITIME ASSN. ET AL. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 135.

No. 85–61. MCFARLAND *v.* BETHLEHEM STEEL CORP. ET AL. C. A. 9th Cir. Certiorari denied.

No. 85–63. BRADY *v.* PETTIT, FORMER MAYOR OF LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1006.

No. 85–68. GOTTSCHALL ET AL. *v.* JONES & LAUGHLIN STEEL CORP. ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 333 Pa. Super. 493, 482 A. 2d 979.

No. 85–70. SARRACEN *v.* APPLEBY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 271.

No. 85–73. FREEDOM SAVINGS & LOAN ASSN. *v.* WAY, DBA FREEDOM REALTY. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 1176.

No. 85–74. GRIFFIN *v.* RHODE ISLAND ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 760 F. 2d 359.

No. 85–75. TENNECO WEST, INC. *v.* MARATHON OIL CO. C. A. 9th Cir. Certiorari denied. Reported below: 756 F. 2d 769.

No. 85–77. RASKIEWICZ *v.* TOWN OF NEW BOSTON ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 754 F. 2d 38.

No. 85–80. CUMBERLAND, MARYLAND, AREA TEAMSTERS PENSION FUND ET AL. *v.* HOOVER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 756 F. 2d 977.

No. 85–83. ZERMAN *v.* MELTON ET AL.; ZERMAN *v.* PRUDENTIAL-BACHE SECURITIES ET AL.; and ZERMAN *v.* JACOBS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 735 F. 2d 751 (first case); 755 F. 2d 915 (second case); 751 F. 2d 82 (third case).

No. 85–86. TUCKER *v.* HARTFORD NATIONAL BANK & TRUST CO. Sup. Ct. Conn. Certiorari denied. Reported below: 195 Conn. 218, 487 A. 2d 528.

No. 85–87. MILIAN-RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 759 F. 2d 1558.

No. 85–89. MEEKER *v.* NEW MEXICO ET AL. Sup. Ct. N. M. Certiorari denied.

No. 85–90. JONES DAIRY FARM *v.* LOCAL NO. P–1236, UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL–

CIO. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 173.

No. 85–91. DE LA LASTRA PETRIRE ET AL. *v.* SPANTAX, S. A. C. A. 2d Cir. Certiorari denied. Reported below: 756 F. 2d 263.

No. 85–101. ARAIZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 762 F. 2d 1003.

No. 85–103. GREAT LAKES DREDGE & DOCK CO., INC. *v.* FURKA, ADMINISTRATRIX OF THE ESTATE OF FURKA. C. A. 4th Cir. Certiorari denied. Reported below: 755 F. 2d 1085.

No. 85–104. KABANUK *v.* MINNESOTA. Ct. App. Minn. Certiorari denied. Reported below: 363 N. W. 2d 877.

No. 85–105. SISSON *v.* HELMS, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 751 F. 2d 991.

No. 85–106. NEW YORK COUNCIL ASSOCIATION OF CIVILIAN TECHNICIANS *v.* FEDERAL LABOR RELATIONS AUTHORITY. C. A. 2d Cir. Certiorari denied. Reported below: 757 F. 2d 502.

No. 85–107. CASTORINA *v.* LYKES BROTHERS STEAMSHIP CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 758 F. 2d 1025.

No. 85–108. AKERMAN *v.* BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 367.

No. 85–113. LANDI *v.* SUI ET UX. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 163 Cal. App. 3d 383, 209 Cal. Rptr. 449.

No. 85–114. SHELTON *v.* WINSOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 762 F. 2d 1019.

No. 85–119. MUELLER *v.* PEVSNER. C. A. 7th Cir. Certiorari denied. Reported below: 762 F. 2d 1015.

No. 85–120. CANYONEERS, INC., DBA GRAND CANYON TRAIL GUIDES *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 756 F. 2d 754.

No. 85–124. COCHRANE *v.* SIMOR ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 135.

No. 85–126. PEACOCK ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 761 F. 2d 1313.

No. 85–127. CARRILLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 417.

No. 85–128. HOFFER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 106 Ill. 2d 186, 478 N. E. 2d 335.

No. 85–133. SYSTEMS ARCHITECTS, INC., ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 757 F. 2d 373.

No. 85–135. HINTON *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1008.

No. 85–139. PENNZOIL CO. ET AL. *v.* ASSOCIATED GAS DISTRIBUTORS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 244 U. S. App. D. C. 145, 756 F. 2d 166.

No. 85–141. PUGH *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 467 So. 2d 1015.

No. 85–143. TAYLOR *v.* BLACKWELL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 255.

No. 85–145. DOUGLAS *v.* TRAVELERS INNS OF NORTH WILKESBORO, INC., DBA HOLIDAY INN OF WILKESBORO. C. A. 4th Cir. Certiorari denied. Reported below: 760 F. 2d 264.

No. 85–147. SOUTHWEST CHEMICAL SERVICES, INC. *v.* SUPERIOR COURT OF MARICOPA COUNTY ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 85–149. HARNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 277.

No. 85–150. CHEVRON U. S. A. INC. *v.* BELCO PETROLEUM CORP. C. A. 5th Cir. Certiorari denied. Reported below: 755 F. 2d 1151.

No. 85–153. BALTIMORE GAS & ELECTRIC CO. ET AL. *v.* HEINTZ ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 760 F. 2d 1408.

No. 85–154. PFLUGER *v.* ILLINOIS DEPARTMENT OF REVENUE ET AL. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 85–158. RUTTER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 760 F. 2d 466.

No. 85–160. HUME, ADMINISTRATRIX OF THE ESTATE OF HUME *v.* DURWOOD MEDICAL CLINIC, INC., ET AL. Ct. App. S. C. Certiorari denied. Reported below: 282 S. C. 236, 318 S. E. 2d 119.

No. 85–161. GARCIA *v.* SOUTHERN PACIFIC TRANSPORTATION CO. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 85–165. BONWICH *v.* BONWICH. Sup. Ct. Utah. Certiorari denied. Reported below: 699 P. 2d 760.

No. 85–166. AMERICAN STEAMSHIP CO. *v.* OBAD. Ct. App. Mich. Certiorari denied.

No. 85–167. HAWLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 759 F. 2d 237.

No. 85–168. GINNODO *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 753 F. 2d 1061.

No. 85–169. CHAPMAN ET AL. *v.* STATE BAR OF CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305.

No. 85–171. UGARTE *v.* UNITED STATES LINES, INC. Ct. App. N. Y. Certiorari denied. Reported below: 64 N. Y. 2d 836, 476 N. E. 2d 333.

No. 85–174. LUNDY *v.* UNION CARBIDE CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 656.

No. 85–176. TRANSCON LINES, INC. *v.* JOSEPH SCHLITZ BREWING CO. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 171.

No. 85–181. COLLINS CO., INC., ET AL. *v.* TECTONICS, INC. OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 753 F. 2d 957.

No. 85–183. AMEND ET AL. *v.* POFF, JUDGE, 47TH JUDICIAL DISTRICT COURT OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 141.

No. 85–185. LARSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 760 F. 2d 852.

No. 85–187. WILLIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 759 F. 2d 1486.

No. 85–190. DENNIE, INDIVIDUALLY AND ON BEHALF OF HIS MINOR SON, NKOSI *v.* UNIVERSITY OF PITTSBURGH SCHOOL OF MEDICINE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1068.

No. 85–192. AUTORINO *v.* SUPERINTENDENT, ARTHUR KILL CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 157.

No. 85–194. ERLBAUM ET AL. *v.* CLEM ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1067.

No. 85–196. MILLER ET AL. *v.* FIRST FEDERAL OF MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 760 F. 2d 1428.

No. 85–197. POTTER *v.* MURRAY CITY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 760 F. 2d 1065.

No. 85–203. SIMS *v.* COOKE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 908.

No. 85–207. NATIONAL DISTILLERS & CHEMICAL CORP. *v.* PRATT. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 146.

No. 85–208. CHEADLE ET UX. *v.* APPLEATCHEE RIDERS ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 757 F. 2d 1035.

No. 85–212. MARTIN *v.* TWO-R DRILLING CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 763 F. 2d 415.

No. 85–218. LUXURY BLANKETS, INC., ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1012.

No. 85–219. F. I. CORP., DBA FLUIDYNE INSTRUMENTATION *v.* BANK OF AMERICA, N. T. & S. A. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 275.

No. 85–223. AURAND ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 262.

No. 85–226. HACKETT *v.* HOUSING AUTHORITY OF THE CITY OF SAN ANTONIO, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 1308.

No. 85–229. SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA ET AL. *v.* APEX CONSTRUCTION CO., INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 757 F. 2d 221.

No. 85–232. PATCHETT *v.* PATCHETT. App. Ct. Mass. Certiorari denied. Reported below: 19 Mass. App. 1109, 475 N. E. 2d 439.

No. 85–233. FUTURA DEVELOPMENT CORP. *v.* CENTEX CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 761 F. 2d 33.

No. 85–235. THRASHER *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 130 Ill. App. 3d 1165, 493 N. E. 2d 759.

No. 85–238. JOHANNS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 20 M. J. 155.

No. 85–240. CHAPMAN *v.* SMITH BARNEY, HARRIS UPHAM & CO., INC. C. A. 2d Cir. Certiorari denied. Reported below: 757 F. 2d 465.

No. 85–243. SERVICE, HOSPITAL, NURSING HOME & PUBLIC EMPLOYEES UNION, LOCAL 47 *v.* COMMERCIAL PROPERTY SERVICES, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 499.

No. 85–247. CRANBERG *v.* CONSUMERS UNION OF UNITED STATES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 2d 382.

No. 85–253. NEW YORK MARINE MANAGERS, INC. *v.* HELENA MARINE SERVICES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 758 F. 2d 313.

No. 85-258. MILLER *v.* INTERNATIONAL TELEPHONE & TELEGRAPH CORP. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 20.

No. 85-262. CORDIS CORP. *v.* MEDTRONIC, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 769 F. 2d 733.

No. 85-269. NABORS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 761 F. 2d 465.

No. 85-270. GANT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 484.

No. 85-274. STELLY ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 761 F. 2d 1113.

No. 85-277. GOVERN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 767 F. 2d 937.

No. 85-281. SOMMERSTEDT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 752 F. 2d 1494.

No. 85-290. RAYNER ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 760 F. 2d 1217.

No. 85-291. JACOB *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 765 F. 2d 140.

No. 85-306. ROSS ET AL. *v.* BOWKER ET AL. Ct. App. Iowa. Certiorari denied. Reported below: 372 N. W. 2d 513.

No. 85-311. COLLIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 766 F. 2d 219.

No. 85-319. WOODSIDE, ADMINISTRATOR OF THE ESTATE OF WOODSIDE *v.* NATIONAL DIRECTOR OF VETERAN'S ADMINISTRATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1078.

No. 85-320. PAPPANIKOLAOU *v.* ADMINISTRATOR OF THE VETERANS ADMINISTRATION. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 8.

No. 85-324. FAZZINO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 765 F. 2d 125.

No. 85–5002. OWENS *v.* LUTHER. C. A. 2d Cir. Certiorari denied.

No. 85–5004. SCHRAMM *v.* CITY OF CUDAHY ET AL. C. A. 7th Cir. Certiorari denied.

No. 85–5005. STEVENS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 123 Wis. 2d 303, 367 N. W. 2d 788.

No. 85–5006. SOMMER *v.* COUNTY OF SUFFOLK ET AL. C. A. 2d Cir. Certiorari denied.

No. 85–5008. ROBINSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 486 A. 2d 727.

No. 85–5009. MCQUEEN *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 755 F. 2d 1174.

No. 85–5012. WEISBRAUT *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 757 F. 2d 83.

No. 85–5014. MILLER *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1009.

No. 85–5015. HEMBREE-BEY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 135.

No. 85–5016. MACK *v.* WILLIAMS ET AL. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 85–5018. WIEBNER *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 85–5019. SKAGGS *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied.

No. 85–5021. SAVOCA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 761 F. 2d 292.

No. 85–5026. BELL ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 132 Ill. App. 3d 354, 476 N. E. 2d 1239.

No. 85–5027. HAYS *v.* HAYS. Sup. Ct. Alaska. Certiorari denied.

No. 85–5030. RAINE *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 7th Cir. Certiorari denied.

No. 85–5031. RASPALDO *v.* CARVER, SUPERINTENDENT, LEHIGH COUNTY PRISON. C. A. 3d Cir. Certiorari denied.

No. 85–5032. EAGLE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85–5033. SMALLWOOD *v.* SCHMIDT, SECRETARY, DEPARTMENT OF PUBLIC SAFETY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 649.

No. 85–5035. HERRERA-CEBALLOS ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 20.

No. 85–5036. HUMPHREY *v.* UNITED STATES DISTRICT COURT OF THE MIDDLE DISTRICT OF GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 85–5037. KELLY *v.* WARDEN, HOUSE OF CORRECTION. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 143.

No. 85–5038. FAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 85–5039. ABRAHAM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 909.

No. 85–5041. CHANDLER *v.* LORD. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 907.

No. 85–5043. MASTERS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 685 S. W. 2d 654.

No. 85–5047. BELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 495.

No. 85–5049. SALMAN *v.* UNITED STATES SUPREME COURT. C. A. 9th Cir. Certiorari denied.

No. 85–5050. VAN HORN *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 991.

No. 85–5051. THACKER, BY AND THROUGH NORMAN, HIS NEXT FRIEND *v.* ATIYEH ET AL. C. A. 9th Cir. Certiorari denied.

No. 85–5052. LEBLANC *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 502.

No. 85–5054. ABERNATHY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 757 F. 2d 1012.

No. 85–5055. PATTERSON *v.* MCWHERTER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1010.

No. 85–5057. LAYHUE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1072.

No. 85–5059. NOTTINGHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 1001.

No. 85–5060. OTIS *v.* SEARS, ROEBUCK & CO. C. A. 7th Cir. Certiorari denied.

No. 85–5061. CARIGON *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 422 Mich. 930, 368 N. W. 2d 871.

No. 85–5063. FAY *v.* O'BRIEN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 85–5066. LIZZANA *v.* SCHWEGMANN GIANT SUPERMARKETS, INC. Sup. Ct. La. Certiorari denied. Reported below: 469 So. 2d 979.

No. 85–5067. BOVEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 146.

No. 85–5068. HAIRSTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 763 F. 2d 233.

No. 85–5069. SMITH *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 303 Md. 361, 493 A. 2d 1082.

No. 85–5070. HALEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 758 F. 2d 1294.

No. 85–5071. PADRON ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 417.

No. 85–5072. HENRY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1070.

No. 85–5075. BOWMAN *v.* CINCINNATI MINE MACHINERY CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1005.

No. 85–5076. BUTLER *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85–5077. PARKER *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 763 F. 2d 665.

No. 85–5079. SAKAL *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 85–5080. SRUBAR ET AL. *v.* DEPARTMENT OF THE TREASURY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 914.

No. 85–5081. GASSETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 153.

No. 85–5083. JOHNSON *v.* NEW YORK STATE COURT OFFICERS ASSN. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 908.

No. 85–5085. RABON *v.* BRYAN COUNTY BOARD OF EDUCATION. Ct. App. Ga. Certiorari denied. Reported below: 173 Ga. App. 507, 326 S. E. 2d 577.

No. 85–5088. FAIRLEY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 467 So. 2d 894.

No. 85–5089. BAD FOOT *v.* BOLT, SHERIFF, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 85–5092. BROWN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 65 N. Y. 2d 813, 482 N. E. 2d 929.

No. 85–5093. CAREY *v.* ALFORD, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 85–5096. COVINGTON *v.* LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 997.

No. 85–5097. CAMPBELL *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 85–5104. GLASS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 761 F. 2d 479.

No. 85–5108. BURTON *v.* STOUTS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 760 F. 2d 273.

No. 85–5109. BROCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1012.

No. 85–5110. ROSE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1075.

No. 85–5114. MUSICANT *v.* TERRY ET AL. Sup. Ct. Haw. Certiorari denied.

No. 85–5118. TRACY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied.

No. 85–5120. CANTERO-RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 152.

No. 85–5122. MORRIS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 85–5123. LUCERO *v.* COLORADO STATE BOARD OF LAW EXAMINERS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 760 F. 2d 239.

No. 85–5124. AUSTAD *v.* RISLEY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 761 F. 2d 1348.

No. 85–5125. LONG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 85–5128. FAISON *v.* McLEAN TRUCKING CO. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 646.

No. 85–5130. KARABIN *v.* PETSOCK, SUPERINTENDENT, PENNSYLVANIA STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 3d Cir. Certiorari denied. Reported below: 758 F. 2d 966.

No. 85–5132. REYES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 759 F. 2d 351.

No. 85–5135. FLEMING *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 470 So. 2d 1343.

No. 85–5136. BURNETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 146.

No. 85–5137. KNOX *v.* TEAMSTERS UNION LOCAL 222 ET AL. C. A. 10th Cir. Certiorari denied.

No. 85–5138. ANDERSON *v.* STAGNER, SUPERINTENDENT, CORRECTIONAL TRAINING FACILITY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 85–5139. FERGUSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85–5142. MILLER ET AL. *v.* DILLON ET AL. C. A. 7th Cir. Certiorari denied.

No. 85–5143. OATES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85–5144. OWENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 85–5146. CLEMENTS *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 334 S. E. 2d 600.

No. 85–5151. HOWARD *v.* HOWARD. Sup. Ct. Ind. Certiorari denied.

No. 85–5152. WILLIAMS *v.* ROCKWELL INTERNATIONAL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 762 F. 2d 1020.

No. 85–5153. FOSTER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 64 N. Y. 2d 1144, 480 N. E. 2d 340.

No. 85–5156. GILES *v.* INDIANA. Sup. Ct. Ind. Certiorari denied.

No. 85–5157. BENSON ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 760 F. 2d 862.

No. 85–5158. BROWNSTEIN *v.* DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 836.

No. 85–5159. MUHAMMAD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1077.

No. 85–5161. WHITTLESEY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 61 Md. App. 721.

No. 85–5165. BROWN *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 293, 764 F. 2d 926.

No. 85–5166. ISARAPHANICH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 109 App. Div. 2d 1107, 487 N. Y. S. 2d 451.

No. 85–5168. HARLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1076.

No. 85–5169. BURTON *v.* FORD ET AL. C. A. 8th Cir. Certiorari denied.

No. 85–5170. BENNETT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 130 Ill. App. 3d 1157, 493 N. E. 2d 755.

No. 85–5172. MILLER *v.* WEBSTER ET AL. C. A. 11th Cir. Certiorari denied.

No. 85–5173. HERRERA-VEGA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 153.

No. 85–5174. PHELPS *v.* SOVRAN BANK. Sup. Ct. Va. Certiorari denied.

No. 85–5175. SELF *v.* STEPHENSON, SUPERINTENDENT, CALEDONIA AND ODOM COMPLEX. C. A. 4th Cir. Certiorari denied. Reported below: 765 F. 2d 139.

No. 85–5176. BURTON *v.* DELANIE ET AL. C. A. 8th Cir. Certiorari denied.

No. 85–5178. HODGES *v.* CITY OF ANN ARBOR, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 932.

No. 85–5179. KALTENBACH *v.* ACADIAN METROPOLITAN CODE AUTHORITY. Sup. Ct. La. Certiorari denied. Reported below: 467 So. 2d 1134.

No. 85–5181. YOUNG *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 285.

No. 85–5183. FORD *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 907.

No. 85–5184. MARIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 158.

No. 85–5187. THOMAS *v.* YLST, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 934.

No. 85–5188. IDLEBIRD *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 85–5191. MERCER *v.* LUTHER, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 85–5192. MARTINEZ-TORRES ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 1019.

No. 85–5194. CEDAR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 922.

No. 85–5197. BILLINGS *v.* SMITH. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 144.

No. 85–5198. LYLES *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 106 Ill. 2d 373, 478 N. E. 2d 291.

No. 85–5199. WILSON *v.* ROCKEFELLER. C. A. D. C. Cir. Certiorari denied.

No. 85–5200. MARTIN-TRIGONA *v.* FERRARI, TRUSTEE. C. A. 1st Cir. Certiorari denied.

No. 85–5201. FROEMAN *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied.

No. 85–5202. BROWN *v.* ZANT. Ct. App. Ga. Certiorari denied. Reported below: 173 Ga. App. XXX.

No. 85–5203. LEAHEY *v.* MCGUIRE, POLICE COMMISSIONER OF THE CITY OF NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 105 App. Div. 2d 1164, 482 N. Y. S. 2d 406.

No. 85–5204. KALEC *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 925.

No. 85–5206. STREICH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 759 F. 2d 579.

No. 85–5207. KESSLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 759 F. 2d 831.

No. 85–5208. HUGHES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85–5210. PATTERSON *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 85–5211. KELLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 85–5215. LAUGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 762 F. 2d 1288.

No. 85–5217. KENNY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 85–5218. BETKA *v.* SMITH ET AL. C. A. 9th Cir. Certiorari denied.

No. 85–5219. ROMAN *v.* ABRAMS, ATTORNEY GENERAL OF NEW YORK. C. A. 2d Cir. Certiorari before judgment denied.

No. 85–5223. SOBIN *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 494 A. 2d 1272.

No. 85–5228. MILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 1022.

No. 85–5229. MIMS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85–5233. O'NEIL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 468 So. 2d 904.

No. 85–5239. WRIGHT *v.* GIRJALVA, WARDEN. Sup. Ct. Ariz. Certiorari denied.

No. 85–5241. PAPSE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 150.

No. 85–5243. PHILLIPS *v.* LOMBARDI ET AL. C. A. 2d Cir. Certiorari denied.

No. 85–5244. PAYNE *v.* COUGHLIN ET AL. C. A. 2d Cir. Certiorari denied.

No. 85–5245. FOSTER *v.* SMITH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 762 F. 2d 1015.

No. 85–5249. BROWN *v.* BRUNO. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 919.

No. 85–5251. ROSBERG *v.* GOERES. Sup. Ct. Neb. Certiorari denied. Reported below: 218 Neb. xxxiv.

No. 85–5253. VIGNE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 85–5254. VIGNE *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied.

No. 85–5255. VIGNE *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 925.

No. 85–5257. CARTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 150.

No. 85–5258. NEUMANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 85–5259. BOONE ET UX. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 759 F. 2d 345.

No. 85–5261. EDGE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85–5265. MEDLIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85–5267. TROTMAN *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION, DALLAS. C. A. 3d Cir. Certiorari denied.

No. 85–5268. DiSILVESTRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 30.

No. 85–5270. LAFFITTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 1119.

No. 85–5272. IGBATAYO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 764 F. 2d 1039.

No. 85–5275. CARTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 992.

No. 85–5276. BRYANT *v.* BRADMAN, JAIL ADMINISTRATOR, ET AL. C. A. 3d Cir. Certiorari denied.

No. 85–5285. CAUTHEN-BEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 755 F. 2d 930.

No. 85–5290. WILSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 909.

No. 85–5292. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 763 F. 2d 773.

No. 85–5295. BLAKE *v.* NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 111 App. Div. 2d 168, 488 N. Y. S. 2d 796.

No. 85–5298. MARTIN *v.* MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85–5301. DOTSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 158.

No. 85–5311. SCOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 171.

No. 85–5312. WEEMPE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 763 F. 2d 671.

No. 85–5318. SIMON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 420.

No. 85–5331. HARTFORD *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 145 Ariz. 403, 701 P. 2d 1211.

No. 84–1543. PITTSBURGH & LAKE ERIE RAILROAD CO. *v.* HUMPHRIES. Super. Ct. Pa. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 328 Pa. Super. 119, 476 A. 2d 919.

No. 84–2013. DUQUESNE LIGHT CO. ET AL. *v.* INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 756 F. 2d 284.

No. 85–52. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* ABINGTON MEMORIAL HOSPITAL ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 750 F. 2d 242.

No. 85–53. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* HUMANA OF AURORA, INC., DBA AURORA COMMUNITY HOSPITAL. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 753 F. 2d 1579.

No. 84–1559. UNITED VAN LINES, INC. *v.* HUNTER ET AL. C. A. 9th Cir. Motion of American Movers Conference for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 746 F. 2d 635.

No. 84–1796. FOLGER COFFEE CO. *v.* INDIAN COFFEE CORP. C. A. 3d Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 752 F. 2d 891.

No. 84–6742. BAILEY ET AL. *v.* BUCKEYE CELLULOSE CORP. C. A. 11th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 84–1842. TORRES *v.* LITTLE FLOWER'S CHILDREN'S SERVICES ET AL. Ct. App. N. Y. Certiorari denied. JUSTICE BRENNAN and JUSTICE BLACKMUN would grant certiorari. Reported below: 64 N. Y. 2d 119, 474 N. E. 2d 223.

No. 84–1850. TEXAS *v.* CHAMBERS. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 688 S. W. 2d 483.

No. 84–1870. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* THOMAS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 758 F. 2d 658.

No. 84–1957. MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* FRANSAW. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 753 F. 2d 1074.

No. 85–138. ABRAMS, ATTORNEY GENERAL OF NEW YORK *v.* ROMAN. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari before judgment denied.

No. 84–1869. MARCONE *v.* PENTHOUSE INTERNATIONAL, LTD. C. A. 3d Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE WHITE would grant certiorari. Reported below: 754 F. 2d 1072.

No. 84–1898. BLACKMON *v.* OBSERVER TRANSPORTATION CO. C. A. 4th Cir. Motion of petitioner for leave to proceed as a veteran granted. Certiorari denied. Reported below: 756 F. 2d 1000.

No. 84–1899. MUELLER *v.* DIEBALL ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 753 F. 2d 1082.

No. 84–1958. RONWIN *v.* HOLOHAN ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE REHNQUIST and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 758 F. 2d 656.

No. 84–2008. READING CO. ET AL. *v.* SCHWEITZER ET AL. C. A. 3d Cir. Motions of Penn Central Corp. and Amatex Corp.

for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 758 F. 2d 936.

No. 84–2009. DEL MONTE CORP. ET AL. *v.* BLAU ET AL. C. A. 9th Cir. Motion of Organization Resources Counselors, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 748 F. 2d 1348.

No. 84–2035. YORK ET AL. *v.* FIRST PRESBYTERIAN CHURCH OF ANNA, ILLINOIS, ET AL. App. Ct. Ill., 5th Dist. Motion of petitioners to consolidate this case with No. 85–10, *Presbytery of Beaver-Butler* v. *Middlesex Presbyterian Church*, *infra*, denied. Certiorari denied. Reported below: 130 Ill. App. 3d 611, 474 N. E. 2d 716.

No. 84–6474. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex.;
No. 84–6551. BONHAM *v.* TEXAS. Ct. Crim. App. Tex.;
No. 84–6596. LEWIS *v.* ILLINOIS. Sup. Ct. Ill.;
No. 84–6651. THOMPSON *v.* TEXAS. Ct. Crim. App. Tex.;
No. 84–6653. FLAMER *v.* DELAWARE. Sup. Ct. Del.;
No. 84–6771. ROACH *v.* MARTIN, WARDEN, ET AL. C. A. 4th Cir.;
No. 84–6823. WALKER *v.* GEORGIA. Sup. Ct. Ga.;
No. 84–6833. DUFF-SMITH *v.* TEXAS. Ct. Crim. App. Tex.;
No. 84–6852. BROWN *v.* FRANCIS, WARDEN. Sup. Ct. Ga.;
No. 84–6861. MATHIS *v.* KEMP, WARDEN. Sup. Ct. Ga.;
No. 84–6879. JOHNSON *v.* FLORIDA. Sup. Ct. Fla.;
No. 84–6899. HOPKINSON *v.* WYOMING. Sup. Ct. Wyo.;
No. 84–6907. DICK *v.* GEORGIA. Sup. Ct. Ga.;
No. 84–6911. BURDEN *v.* KEMP, WARDEN. Sup. Ct. Ga.;
No. 84–6970. DAMON *v.* SOUTH CAROLINA. Sup. Ct. S. C.;
No. 85–5044. STAFFORD *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 85–5095. PROVENS *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, ET AL. C. A. 6th Cir.;
No. 85–5119. OATS *v.* FLORIDA. Sup. Ct. Fla.;
No. 85–5212. GRAYSON *v.* ALABAMA. Sup. Ct. Ala.;
No. 85–5220. PINKERTON *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;
No. 85–5224. POYNER *v.* VIRGINIA. Sup. Ct. Va; and
No. 85–5225. POYNER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: No. 84–6474, 691 S. W. 2d 619;

No. 84–6551, 680 S. W. 2d 815; No. 84–6596, 105 Ill. 2d 226, 473 N. E. 2d 901; No. 84–6651, 691 S. W. 2d 627; No. 84–6653, 490 A. 2d 104; No. 84–6771, 757 F. 2d 1463; No. 84–6823, 254 Ga. 149, 327 S. E. 2d 475; No. 84–6833, 685 S. W. 2d 26; No. 84–6852, 254 Ga. 83, 326 S. E. 2d 735; No. 84–6879, 465 So. 2d 499; No. 84–6899, 696 P. 2d 54; No. 84–6970, 285 S. C. 125, 328 S. E. 2d 628; No. 85–5044, 700 P. 2d 223; No. 85–5119, 472 So. 2d 1143; No. 85–5212, 479 So. 2d 76; Nos. 85–5224 and 85–5225, 229 Va. 401, 329 S. E. 2d 815.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 84–6527. BAILEY *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 284 Ark. 379, 682 S. W. 2d 734.

No. 84–6558. STEWART *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 686 S. W. 2d 118.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner in this case seeks no revolutionary expansion of the principles underlying this Court's current death penalty jurisprudence. All he asks is the benefit of existing law as proclaimed by a majority of this Court. This Court has declared that a sentence of death may not be imposed on one "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982). Yet the Court's refusal to consider petitioner's case countenances just that result. Even if I believed, therefore, that the death penalty could constitutionally be imposed under certain circumstances,[1] I would grant certiorari in this case and vacate the death sentence imposed here.

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[1] I continue to adhere to my view that the death penalty is, in all circumstances, cruel and unusual punishment prohibited by the Eighth and

I

At his murder trial, petitioner Darryl Elroy Stewart and his accomplice Kelvin Kelly provided conflicting theories about the crime. According to Stewart's statement, which the State introduced at trial, he and Kelly were walking past the deceased's apartment when Kelly saw through the open door a stereo that he wanted to steal. Kelly told Stewart that he was going to run in and grab the stereo, and instructed Stewart to stand guard at the door. Stewart heard a woman scream; heard Kelly attempt to force sexual relations on her; saw glimpses of a struggle; and heard two shots. Thus, Stewart's statement indicated that he agreed to assist in Kelly's theft of the stereo; that Kelly strayed from the plan to steal the stereo and attempted to commit a sexual offense against the occupant of the apartment; and that during the course of this offense Kelly killed the victim. If Stewart's account of the crime is accepted, he did not himself kill, did not attempt to kill, and did not intend that a killing would take place. According to Kelly, however, it was Stewart who entered the apartment to commit burglary, Stewart who had the gun, Stewart who attempted a sexual assault on the victim, and Stewart who killed her, while Kelly waited at the door; the State introduced some evidence corroborating this story. Kelly was promised, in exchange for his testimony, that he would receive no more than 50 years in prison.

II

The jury was asked to resolve this conflicting evidence and determine the guilt or innocence of Stewart on the murder charge. In order to guide the jury in that endeavor, the trial judge gave a lengthy instruction on the Texas "law of parties," set out in full in the margin.[2] 686 S. W. 2d 118, 123 (Tex. Crim. App. 1984).

Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring).

[2] The judge charged the jury as follows:

"'Now, if you find from the evidence beyond a reasonable doubt that . . . the Defendant, Darryl Elroy Stewart, did while in the course of committing or attempting to commit burglary of a habitation, . . . intentionally caused *[sic]* the death of [the victim] by shooting her with a gun, then you will find the Defendant guilty of Capital Murder, as charged in the Indictment. Or if you

The instructions provided the jury with two theories of capital murder. First, the jury could find Stewart guilty of having intentionally shot the victim himself. Alternatively, the jury could find the following series of facts: that Stewart conspired to commit burglary; that the murder was committed by Kelly in the course of the burglary; that Stewart was *intentionally* aiding Kelly in the execution of the *burglary* at the time that Kelly committed the murder; and that the murder was an offense that "should have been anticipated" as a result of the conspiracy. Either of the two findings would support a verdict of guilty of capital murder.

The jury returned a verdict of guilty. Defense counsel requested that the jury be instructed to specify upon which of the two murder offenses it had convicted Stewart, but the trial judge denied the request. The trial proceeded to the sentencing phase, and petitioner was sentenced to die.

III

Under the Texas capital murder statute, a murder does not constitute capital murder merely because it was committed in the course of a burglary or other specified felony. The statute explicitly provides that the murder must have been committed "intentionally" in the course of the other felony. Tex. Penal Code Ann. § 19.03(a)(2) (Supp. 1985). In theory, therefore, a person cannot be required to face the death penalty without having acted with an

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find from the evidence beyond a reasonable doubt that . . . Kelvin Kelly and Darryl Elroy Stewart entered into a conspiracy to burglarize the habitation . . . , and that pursuant thereto they did carry out or attempt to carry out such conspiracy to commit burglary, and while in the course of committing such burglary, if any, Kelvin Kelly did intentionally cause the death of [the victim] by shooting her with a gun and that the Defendant, Darryl Elroy Stewart, pursuant to said conspiracy, if any, with the intent to promote, assist, or aid Kelvin Kelly in the commission or attempted commission of the said burglary, then and there, at the time of the shooting, if any, was acting with and aiding Kelvin Kelly in the execution or attempted execution of said burglary, and that the shooting of [the victim] followed in the execution of the conspiracy and in furtherance of the unlawful purpose of Kelvin Kelly and Darryl Elroy Stewart to commit the burglary, and that the shooting of [the victim] was an offense that should have been anticipated as a result of the carrying out of the conspiracy, then you will find the Defendant, Darryl Elroy Stewart, guilty of Capital Murder as charged in the indictment.'" 686 S. W. 2d, at 123–124.

intent to kill. Ironically, it was this reading of the statute that led this Court, in *Enmund*, to number Texas among the States that did not permit a capital sentence to be imposed upon a person convicted only of felony murder. 458 U. S., at 790, n. 7.

The *Enmund* Court's assessment, however, did not take into account the Texas "law of parties." Under that law, a person can be punished for an offense committed by another if he is "criminally responsible" for the other person. Tex. Penal Code Ann. § 7.01(a) (1974). The "criminal responsibility" of person *A* arises if *A* conspires to commit one felony and, in furtherance of that unlawful purpose, a co-conspirator in the first felony commits a second offense that "should have been anticipated" as a result of the conspiracy. The statute explicitly provides that *A* is guilty of the second offense even "though having no intent to commit it." Tex. Penal Code Ann. § 7.02(b) (1974); see *Ruiz* v. *State*, 579 S. W. 2d 206, 209 (1979) ("[S]ection 7.02(b) . . . eliminates any necessity on the part of the State to prove the appellant had any intent to kill"). If the first offense is burglary, and the co-conspirator's second offense happens to be murder, then *A* may be deemed to have committed capital murder—even though the capital murder statute requires that the murder be committed intentionally in the course of a felony. The vulnerability of *A* to a capital charge under these circumstances, therefore, is entirely dependent on the acts of his co-conspirator; *A*'s own criminal accountability is not entirely within his control. In this application of the Texas statutes, every intent element that would normally guard against a capital charge for one who did not kill or intend to kill can be neatly circumvented and substituted with the fiction of vicarious intent. This is no mere theoretical quirk in state law; it is precisely the train of logic that quite possibly led to the death sentence in this case.

The entire conduct of petitioner's trial operated to buttress the prejudice created by the State's reliance on this illusory edifice of intent. For example, every juror who ended up on petitioner's panel had stated in *voir dire* that he or she could find a nontriggerman guilty of capital murder and could impose the death sentence, even if the defendant had no specific intent to kill or to cause a killing.[3] Moreover, when the defense attorney attempted

[3] Petitioner was sentenced before this Court issued its decision in *Enmund*. Petitioner has not made it clear whether defense counsel moved to

to explain to the jury that the law of parties—that is, vicarious intent—is not applicable to sentencing decisions, the trial court sustained the prosecutor's objection on the ground that counsel had misstated the law. Further, the judge did not instruct the jury that at the sentencing stage it was obliged to consider mitigating circumstances, such as the possibility that Stewart played a relatively minor role in the murder.[4] At every step of the way, one or more of these factors contributed to the likelihood that the jury failed to understand that it could not rely on vicarious intent to determine whether a defendant deserves to die.

Respondent contends that any deficiency in the jury's consideration of intent was cured at the sentencing phase. The judge's charge to the jury made it clear that imposition of the death sentence would be contingent upon a jury finding that "the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result." See Tex. Code Crim. Proc. Ann., Art. 37.071(b)(1) (Vernon 1981). But the deliberateness of a burglary simply cannot be equated with an intent to kill. Moreover, it seems that the judge informed the jury, over defense objection, that the conduct which must be found to be deliberate as a prerequisite to the death sentence includes the conduct of the triggerman, as attributed to the defendant through the law of parties. Thus, the "individualized consideration" of the

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strike the panel on the basis of its expressed willingness to impose death in the absence of intent. Even if he did not, however, the *Enmund* claim was preserved by counsel's request for a specification of the offense on which petitioner was convicted, his unsuccessful attempt to state to the jury that the law of parties does not apply at sentencing, and other related objections made at trial.

[4] Petitioner argues that this failure of the trial court to instruct the jury that it must consider mitigating circumstances violates *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), in which the Court held that a State may not preclude the sentencer from considering mitigating circumstances. *Id.*, at 113–114. Whether *Eddings* requires such instructions in all cases has not been explicitly decided. In this case, however, the lack of instruction concerning the jury's obligation to consider mitigating factors is particularly troubling, because the determination that the jury was expected to make at sentencing was strikingly similar to the findings it had already made at the guilt phase. Without guidance from the judge, it is quite possible that the jury believed the death sentence to be an automatic result of the conviction.

defendant's own culpability, required by *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978), was entirely neglected. Nor can the constitutional demand for culpable intent be satisfied by the jury's finding that there was a reasonable expectation that death would result from the burglary. Such a finding does not even purport to be a measure of "personal responsibility and moral guilt," without which a defendant cannot be held accountable with his life. *Enmund* v. *Florida*, 458 U. S., at 801.

IV

This case differs from *Enmund* in only one pertinent respect. In *Enmund*, the only evidence implicating the defendant was an inference that he was waiting near the scene of the crime in order to help the principal perpetrators escape. *Id.*, at 788. No conflicting evidence tended to show that Enmund may have been the actual killer. Here, in contrast, there was some evidence tending to establish Stewart as the triggerman. Nevertheless, we cannot be certain whether the jury imposed a sentence of death in the absence of an essential factual premise or not. For purposes of determining whether the Constitution has been violated, therefore, we simply cannot discount the grave possibility that Stewart was sentenced to death without the mental state that *Enmund* recognized as prerequisite to any such sentence.[5] See *Sandstrom* v. *Montana*, 442 U. S. 510, 517 (1979). The courts should not permit unconstitutional death sentences to escape meaningful

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[5]This Term, the Court will consider whether *Enmund* requires that the jury make a finding of intent, or whether an appellate court may make the requisite finding upon review of the evidence. See *Bullock* v. *Lucas*, 743 F. 2d 244 (CA5 1984), cert. granted *sub nom. Cabana* v. *Bullock*, 471 U. S. 1052 (1985). If this Court determines in *Bullock* that a jury finding of intent is required, petitioner's sentence will have to be vacated. Moreover, even if this Court resolves *Bullock* by concluding that an appellate finding of intent will suffice under *Enmund*, petitioner's sentence should still be vacated, because such a finding could not be made by an appellate court in this case. Petitioner's jury did not explicitly convict on one offense or the other, and the evidence supporting an intentional murder conviction conflicts with the evidence supporting a conviction for felony murder. Thus, it would be impossible for an appellate court to divine which of the mutually exclusive sets of testimony was accepted by the jury and should accordingly be examined for indications of intent. We should grant this petition irrespective of *Bullock*.

review merely because one can conceive of an alternative theory under which the execution can be imagined to fall within the terms of this Court's demands. The obligation of the courts is especially compelling here, because the State clearly had the option of eliminating any doubt on the issue by charging only the intentional murder offense and thus forestalling any *Enmund* problem. At least the State might have refrained from objecting to the defense counsel's attempts to inform the jury regarding the inapplicability of the law of parties at the sentencing phase. One cannot help but wonder why the State did not do anything to reduce the confusion, if it is indeed as confident as it claims to be that the jury's finding of guilt was based solely on intentional murder.

The likelihood that Stewart was convicted and sentenced to death on a theory of vicarious intent requires that *Enmund* be our guide in evaluating the legal claims put forward by petitioner. Like Enmund, Stewart has been sentenced to death "in the absence of proof" that he "killed or attempted to kill," or that he "intended or contemplated that life would be taken." 458 U. S., at 801. Some disputed evidence suggested that Stewart had such intent, but we have no proof thereof, and we cannot tell from the verdict whether the jury so found.

V

Although this Court upheld the Texas capital sentencing scheme against certain challenges in *Jurek* v. *Texas*, 428 U. S. 262 (1976), petitioner's case demonstrates that the statute must be measured against a different standard when the State seeks to execute one convicted of felony murder. In this context, the statute is wholly inadequate to meet the constitutional demands articulated in *Enmund*, because it does not ensure that the ultimate sentence will be reserved for those who have intended to kill. Quite simply, that is what *Enmund* demands, and what the Eighth and Fourteenth Amendments, at a minimum, require. I would grant the petition, vacate the sentence, and remand for further proceedings.

No. 84–6589. BROFFORD *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 751 F. 2d 845.

No. 84–6660. BECK *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 254 Ga. 51, 326 S. E. 2d 465.

No. 85–5094. BAILEY *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 490 A. 2d 158.

No. 84–6668. THOMAS *v.* UNITED STATES;
No. 84–6673. THOMAS *v.* UNITED STATES; and
No. 84–6872. THOMAS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: No. 84–6668, 243 U. S. App. D. C. 349, 753 F. 2d 167; No. 84–6673, 243 U. S. App. D. C. 348, 753 F. 2d 166; No. 84–6872, 245 U. S. App. D. C. 234, 759 F. 2d 960.

No. 84–6980. WHITLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 759 F. 2d 327.

No. 85–5045. GROZA *v.* VETERANS ADMINISTRATION ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 755 F. 2d 935.

No. 84–6864. BUSBY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 464 So. 2d 262.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

Once again this Court has declined to correct an error of constitutional magnitude with a defendant's life in the balance. The petitioner's death sentence was unconstitutionally imposed under last Term's decision in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), and this Court's refusal to vacate that sentence is an unwarranted departure from procedures that we follow routinely in the most insignificant case.

I

The petitioner was convicted of first-degree murder. At the sentencing phase of his trial, his counsel attempted to impress upon the jury the significance of its role, in light of the growing number of executions in Louisiana and the Nation as a whole. Counsel admonished the jurors that, should they decide upon the death penalty, they should "'give it with the appreciation that it'll be carried out.'" 464 So. 2d 262, 266 (La. 1985). The prosecutor responded by arguing to the jury:

> "'Though it's difficult to stand before you ladies and gentlemen and ask you to consider imposing upon anyone the pen-

> alty of death, but in order to make your task easier, we'll state for you that first of all, you have a solemn obligation to live up to your oath. Second of all, that whatever you decide will be recommendations—and recommendations to the Judge, for the Judge to impose the death penalty. It will be the Judge that sentences this defendant to whatever the sentence might be. You make recommendations.'" *Ibid.*

The jury sentenced petitioner to death.

II

After the Louisiana Supreme Court had affirmed petitioner's conviction and death sentence, and after his petition for certiorari had been filed, this Court decided *Caldwell.** There, the Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U. S., at 328–329. In *Caldwell*, the prosecutor argued to the jury that the State Supreme Court would automatically review the death sentence. This Court noted that the jury might not understand the limits on appellate review, and might conclude that the ultimate determination of the appropriateness of a death sentence for that defendant would lie with the court. *Id.*, at 330–331. Furthermore, whether or not the jury was misled as to the appellate court's function, it might decide to "delegate" its responsibility to the court. *Id.*, at 332.

In the present case, we need not speculate about the misleading nature of the prosecutor's argument, for it flatly misstated Louisiana law. In Louisiana, a jury's decision in favor of death is binding on the court. La. Code Crim. Proc. Ann., Art. 905.8 (West 1984). Thus, the prosecutor's argument in this case was not an "accurate statement of a potential sentencing alternative," as in *California* v. *Ramos*, 463 U. S. 992, 1009 (1983); cf. *Caldwell*, *supra*, at 342 (O'CONNOR, J., concurring in part and concurring in judgment). Rather, the prosecutor's argument urged the jury

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*This chronology explains petitioner's failure to raise the *Caldwell* violation in his petition for certiorari. This Court, of course, may correct a plain error not presented in the petition for certiorari. *Washington* v. *Davis*, 426 U. S. 229, 238 (1976). The Louisiana Supreme Court expressly decided the issue, so there is no jurisdictional bar to our considering it.

"to minimize the importance of its role," 472 U. S., at 333, with statements that were both improper under *Caldwell* and factually inaccurate.

Although the Louisiana Supreme Court acknowledged that the prosecutor's remarks were "troublesome," 464 So. 2d, at 266, it concluded that the jury was not misled. The court noted that the trial judge had remarked to the jury, at the *beginning* of the sentencing phase, that the jury "is given the authority to make a binding recommendation to the trial judge as to the sentence." *Ibid.* The judge had also stated that he would impose life imprisonment if the jury could not reach a unanimous recommendation. *Id.*, at 267.

Those statements are inadequate to cure the prosecutor's inaccurate remarks. The judge did not correct the prosecutor's statements in his charge, nor did he acknowledge the binding effect of the jury's decision. Indeed, he compounded the error by telling the jurors that it was their duty "'to make your recommendation as to the sentence that the Court should impose.'" *Ibid.* Because the prosecutor had affirmatively and unambiguously informed the jury that the ultimate responsibility for the decision rested with the judge, the jury could easily have believed that its decision to impose the death penalty was not automatically binding. In this situation, one cannot possibly conclude that the improper argument "had no effect on the sentencing decision," *Caldwell*, *supra*, at 341. Petitioner's death sentence, therefore, cannot stand.

III

The death sentence in this case was imposed in violation of the Eighth and Fourteenth Amendments as interpreted in *Caldwell*, *supra*. Our usual practice when an intervening decision of the Court may affect a lower court's decision is to grant the petition, vacate the judgment or sentence as appropriate, and remand for further consideration in light of the intervening case. See, *e. g.*, *Wainwright* v. *Henry*, 463 U. S. 1223 (1983). Because the Court has declined to follow our general practice, with such enormous consequences for the petitioner, I dissent.

No. 84–6866 (A–923). BREEZE *v.* UNITED STATES. C. A. 4th Cir. Application for release and motion for stay of mandate, addressed to JUSTICE BRENNAN and referred to the Court, denied. Certiorari denied. Reported below: 755 F. 2d 930.

No. 84-6873. PATTEN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 467 So. 2d 975.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the judgment below so that the court below can determine the sentence—other than death—that may be appropriate.

JUSTICE MARSHALL, dissenting.

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). I also continue to believe that the death penalty's cruel and unusual nature is made all the more arbitrary when it is imposed by a judge in the face of a jury determination that death is an inappropriate punishment. See *Jones* v. *Alabama*, 470 U. S. 1062, 1063 (1985) (MARSHALL, J., dissenting from denial of certiorari); *Spaziano* v. *Florida*, 468 U. S. 447, 481–490 (1984) (STEVENS, J., dissenting). However, even were I to believe that the death penalty could constitutionally be imposed under certain circumstances and that a jury decision for life could be accorded mere advisory status, I would grant certiorari in this case to decide whether the Double Jeopardy Clause bars the State from forcing a defendant to face a second sentencing jury even though the presumptive validity of his first jury's life recommendation has never been overcome.

I

Petitioner Robert Patten was convicted of first-degree murder, and the State sought the death penalty. During subsequent sentencing deliberations, the jury advised the trial judge that they were deadlocked, 6 to 6; the note concluded: "What now?" Over petitioner's objections, the judge responded by giving an *Allen* charge encouraging further deliberations.[1] After continued deliberations, the jury returned with a 7-to-5 recommendation for death. The court imposed the death sentence. On appeal, the Florida Supreme Court affirmed petitioner's conviction. 467

[1] *Allen* v. *United States*, 164 U. S. 492, 501–502 (1896).

So. 2d 975 (1985). It emphasized, however, that under Florida law, "if seven jurors do not vote to recommend death, then the recommendation is life imprisonment." *Rose* v. *State*, 425 So. 2d 521, 525 (Fla. 1982), cert. denied, 461 U. S. 909 (1983). The court consequently found the giving of the *Allen* charge improper and vacated the death sentence. At this point, though, rather than instructing the trial judge to determine whether it would be appropriate to enter a death sentence regardless of the jury's action, the court chose to remand the case to the trial court for a new sentencing proceeding before a jury. In his motion for rehearing, petitioner urged that the Double Jeopardy Clause barred a second sentencing proceeding. That motion was denied.

II

In *Bullington* v. *Missouri*, 451 U. S. 430 (1981), this Court held that because Missouri's capital sentencing proceeding was comparable to a trial, in which a life sentence constituted a determination that the prosecution had failed to prove its case, the Double Jeopardy Clause barred the State from subjecting a defendant who had received a life sentence in his first trial to the ordeal of a second sentencing proceeding after his conviction had been reversed. In *Arizona* v. *Rumsey*, 467 U. S. 203 (1984), where a life sentence had been imposed by a judge rather than a jury, the Court found that the Double Jeopardy Clause barred resentencing even though the judge's decision to grant life had been based upon what was later held to be a misinterpretation of state law. "[A]n acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge." *Id.*, at 211.

In Florida, the jury is not the sole decisionmaker in the sentencing proceedings; the trial judge has the power to override a jury's recommendation for life. See *Spaziano* v. *Florida*, *supra*. Yet the defendant who has persuaded a jury to reject the State's claim that he deserves to die has nonetheless won a significant victory, for Florida has severely limited the trial judge's power to override a life recommendation. In *Tedder* v. *State*, 322 So. 2d 908 (1975), the Florida Supreme Court held an override to be appropriate only where the "facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Id.*, at 910; accord, *Odom* v. *State*, 403 So. 2d 936, 942 (Fla. 1981), cert. denied, 456 U. S. 925 (1982). Thus, while the life recommendation of a Florida jury does not have the conclusive

effect of the Missouri jury's decision for life that was considered in *Bullington*, the recommendation is presumed final, subject to reversal only where "virtually no reasonable person could differ."

Because a Florida jury's life recommendation is not completely final, this Court has held that the Double Jeopardy Clause does not bar the judge's override of a jury's life recommendation. *Spaziano* v. *Florida*, *supra*. However, where a defendant is deprived of the benefits of a jury's life recommendation without any subsequent finding by the trial judge that that recommendation was "clear[ly] and convincing[ly]" unreasonable, I believe there to be a double jeopardy bar to the State's demand that the defendant convince yet another jury that he does not deserve to die. If not held unreasonable, a jury's life recommendation should end a Florida defendant's jeopardy as surely as a life verdict ended that of the Missouri defendant in *Bullington*.

Petitioner was deprived of a jury's life recommendation without any court having found that advisory verdict unreasonable. Under Florida law, a 6-to-6 vote is a life recommendation. See *Rose* v. *State*, *supra*, at 525. When the trial judge received the jury's note indicating that it was deadlocked 6 to 6, there was therefore nothing left for him to do but recall the jury and apply the *Tedder* standard to its life recommendation. I can scarcely believe that the trial judge would have overridden such a recommendation in this case; had he done so, he doubtless would have been reversed on appeal.[2] But instead, the trial judge altered the verdict by giving an *Allen* charge. Then, even while holding the judge to have erred in giving the charge, the Florida Supreme Court proceeded to disregard the fact that the jury's deadlock was a finding for defendant on the issue of death. The Supreme Court's decision to remand was not based upon any finding that a life sentence was unreasonable. The Supreme Court remanded only because the jury's report of a 6-to-6 deadlock had not been contained in a formal recommendation. Since I do not believe that this adherence to formalism is consistent with the double jeopardy concerns implicated by the Supreme Court's demand that petitioner convince yet another jury that he does not deserve to die, I must dissent from this Court's refusal to hear this case.

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[2] Indeed, by "direct[ing] the trial court's attention" to *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), "and its possible application to the facts of this case," the Florida Supreme Court suggested its concern that the trial judge had failed to consider evidence militating in favor of a life sentence. 467 So. 2d 975, 980 (1985).

No. 84-6982. BURR *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 466 So. 2d 1051.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

This petition presents the question whether the sentencing jury in a capital case may be prohibited from taking into account its own nagging doubts about the defendant's guilt as it considers whether the defendant deserves to die. The Supreme Court of Florida has squarely resolved that question in the affirmative, despite the clear message of *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), that a capital defendant is entitled to have the jury consider "any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, *supra*, at 604.

Even if I accepted the prevailing view that the death penalty can constitutionally be imposed under certain conditions, I would grant certiorari in this case to consider the grave constitutional question it presents. Today's decision lets stand a ruling that clearly "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, *supra*, at 605 (opinion of BURGER, C. J.), quoted in *Eddings*, *supra*, at 118 (O'CONNOR, J., concurring).

I

Petitioner, Charlie Burr, was charged with the murder of a convenience-store clerk during a robbery of the store. At trial, the State's key witness was Burr's girlfriend, Domita Williams, who testified that she had been waiting for Burr outside the store when she heard a shot and then saw Burr come out. The State provided some circumstantial evidence in corroboration. The following day, however, Williams took the stand for the defense and recanted her testimony of the previous day. This time she swore that she had not been with Burr at all on the morning of the murder, and recited a different account of her actions that morning. The defense produced witnesses to support this testimony, including an eyewitness who placed Williams elsewhere at the time of the murder. The defense attempted to establish that Williams' first testimony had been the product of coercion by the prosecutor; the State, in turn, attempted to show that her second testimony was contrived out of fear of petitioner. Without

Williams' first testimony, the State would not have had a case, for while the State introduced evidence implicating Burr in similar robberies of other convenience stores, it adduced no other evidence directly linking Burr with this crime. The jury returned a verdict of guilty.

At the sentencing hearing, defense counsel devoted his entire closing argument to the inconclusive nature of the evidence against Burr. Counsel drove home to the jury the fact of Domita Williams' recantation, repeatedly exhorting each juror to "ask yourself . . . , is it possible that I'm recommending death for an innocent person?" Suggesting that the guilty verdict might have been based on the evidence of the other robberies, he admonished the jury, "if you go back and recommend death . . . and Mr. Burr is eventually electrocuted and put to death, then it's going to be a little too late for the truth to come out . . . ." He concluded, "don't make a recommendation where a man is going to die when he may not have even committed the crime."

The jury recommended a sentence of life imprisonment. The trial judge, however, overrode this recommendation and sentenced petitioner to death, having identified three aggravating circumstances and nothing in mitigation. Petitioner deduced, and argued on appeal, that the jury's recommendation of life had been based, legitimately, on residual doubt of Burr's guilt. The Florida Supreme Court rejected this argument, concluding that "a 'convicted defendant cannot be "a little bit guilty."'" 466 So. 2d 1051, 1054 (1985), quoting *Buford* v. *State*, 403 So. 2d 943, 953 (Fla. 1981), cert. denied, 454 U. S. 1164 (1982).

II

Implicit in the Florida Supreme Court's decision is an assumption about the equation of finality and truth that transgresses law and intuition alike. For our legal system is no pretender to absolute truth. In two important ways, the factfinding process falls short of that ideal. First, the beacon of the truth-seeking process in criminal cases is not absolute certainty, but the "reasonable doubt" standard, which has eluded definition by the courts for centuries. See 9 J. Wigmore, Evidence § 2497 (J. Chadbourn rev. 1981). Attempts at such a definition typically, and often erroneously, include phrases such as "substantial doubt, not a trivial doubt," *Holland* v. *United States*, 209 F. 2d 516, 522 (CA10), aff'd, 348 U. S. 121 (1954), and "substantial, . . . real doubt," *Tay-*

lor v. *Kentucky*, 436 U. S. 478, 488 (1978). Although a uniform definition of the term has never evolved, it is clear that juries are not instructed to return a verdict only when all doubt has been eliminated. Rather, the "reasonable doubt" standard merely attempts "to exclude as nearly as possible the likelihood of an erroneous judgment." *Addington* v. *Texas*, 441 U. S. 418, 423 (1979). Hence, "beyond a reasonable doubt" cannot ensure that a jury will not convict a defendant without foreclosing all possibility of innocence in the jurors' own minds.

Moreover, no instruction can prevent the possibility of human error. "[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened." *In re Winship*, 397 U. S. 358, 370 (1970) (Harlan, J., concurring). Accordingly, the institutions of criminal justice have been adjusted in recognition that a jury's verdict and truth are not unerringly synonymous. Every jurisdiction provides some mechanism for awarding a convicted defendant a new trial on the basis of newly discovered evidence. If a convicted defendant can produce sufficient indication that the jury's finding of guilt beyond a reasonable doubt was wrong, the institutional need for finality yields to the more compelling concerns of truth and fairness. Thus, the "reasonable doubt" foundation of the adversary method attains neither certainty on the part of the factfinders nor infallibility, and accommodations to that failing are well established in our society. See also *Jackson* v. *Virginia*, 443 U. S. 307, 317–318 (1979) (reversal of jury verdict supported by insufficient evidence). In the capital sentencing context, the consideration of possible innocence as a mitigating factor is just such an essential accommodation.

Prominent scholars of our time agree. The Model Penal Code absolutely precludes the imposition of a death sentence if the sentencer is satisfied that, "although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt." ALI, Model Penal Code §210.6(1), p. 107 (1980). Three Justices of this Court have stated that the possibility of an irrevocable mistake is a valid reason for a jury to conclude that the death penalty is not morally justified. *Spaziano* v. *Florida*, 468 U. S. 447, 488, n. 34 (1984) (STEVENS, J., joined by BRENNAN and MARSHALL, JJ., concurring in part and dissenting in part); *Heiney* v. *Florida*, 469 U. S. 920, 924 (1984) (MARSHALL, J., dissenting). Finally, two Courts of Appeals have determined that

jurors may hold a *genuine*, if not a *reasonable*, doubt of guilt sufficient to support a sentence of life. *Smith* v. *Wainwright*, 741 F. 2d 1248, 1255 (CA11 1984), cert. denied, 470 U. S. 1087 (1985); *Smith* v. *Balkcom*, 660 F. 2d 573, 580–581 (CA5 1981), cert. denied, 459 U. S. 882 (1982).

I have written before to describe the subjective personal horror that must face a juror who contemplates sentencing a man to die without being sure of his guilt. *Heiney* v. *Florida*, *supra*, at 921–922. But there is an additional point to be made: that permitting the consideration of lingering doubt at sentencing is objectively a rational and consistent element of our system of criminal justice. Like postconviction remedies in light of new evidence, the conscience of the jury serves to protect against irremediable errors arising in that gray area known as "reasonable doubt." And when the stakes are life and death, the Constitution forbids the closure of that safety valve, as surely as it forbids the preclusion of other considerations suggesting that a convicted defendant should not die. See *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982).

The defendant who has been condemned to die will not reap the benefits of postconviction remedies designed to compensate for jury fallibility when the basis for such relief arises long after conviction. His only protection lies in the consciences of the jurors, for only they know the degree of certainty with which they voted the defendant guilty.* The State of Florida would wrest from the jurors their only way of expressing their lingering doubts about their verdict, and from the defendant his only hope of vindication.

III

We cannot know the basis for a jury's recommendation of life, as long as the jury is not required to supply its reasons. Nevertheless, in petitioner's case we do know several relevant things. First, we know that little, if any, mitigating evidence other than the possibility of innocence could have accounted for the jury's sentence. Second, we know that the defense counsel rested his

*To the extent that a jury recommendation of life based on doubt can be said to be inconsistent with that same jury's finding of guilt, the legitimacy of the guilty verdict itself is rendered unreliable and therefore constitutionally suspect. The remedy for such a defect is not a death sentence, but a new trial.

plea for his client's life solely on the striking inconclusiveness of the evidence against petitioner, conceding that this argument had not carried the day at the guilt phase, but imploring the jurors to consider it as a matter of conscience at sentencing. Third, we know that the Supreme Court of Florida considered petitioner's claim on its merits, without questioning the factual premise of the argument, and ruled that doubt as to a convicted defendant's guilt cannot be considered as a factor mitigating against the death sentence. This determination bars consideration of a factor that is both relevant, see *Eddings*, *supra*, at 113–114, and reasonable, see *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975). Under these compelling circumstances, this Court should not shrink from correcting a misguided principle of law that so surely increases the likelihood that innocent people will go to their deaths.

Rather than bristle at a superficial inconsistency between a guilty verdict and a life sentence based on doubt, we should readily acknowledge that a juror may understand the law to demand less than the conscience. In a capital case, the Eighth Amendment does not tolerate such a distinction.

No. 84–7002. DEL VECCHIO *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 105 Ill. 2d 414, 475 N. E. 2d 840.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Despite this Court's demand "for reliability in the determination that death is the appropriate punishment in a specific case," *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976), the Illinois Supreme Court found there to be no error in the admission of two confessions at petitioner's capital sentencing hearing, without any inquiry having been made as to their reliability. Because those confessions had been obtained in connection with charges to which petitioner had long before pleaded guilty, the court found petitioner precluded from challenging their voluntariness later, when he was fighting for his life. Even were I to believe that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari in this case to determine whether the Illinois Supreme Court's decision can be reconciled with "the standard of reliability that the Eighth Amendment requires," *Caldwell* v. *Mississippi*, 472 U. S. 320, 341 (1985). See *Bare-*

foot v. *Estelle*, 463 U. S. 880, 924–925 (1983) (BLACKMUN, J., dissenting).*

I

Petitioner George Del Vecchio was convicted in 1979 of murder, rape, deviate sexual assault, and burglary, and the State sought the death penalty. At his capital sentencing hearing, the prosecutor urged as a statutory aggravating factor the fact that in 1965, when he was 16 years old, petitioner had been convicted upon a plea of guilty to charges of murder, robbery, and attempted robbery. The prosecution also sought to introduce two confessions that petitioner had made to those previous crimes; these confessions, made to a police officer and an Assistant District Attorney respectively, contained detailed statements as to petitioner's role in the 1965 crimes. Petitioner moved to suppress these statements at the sentencing hearing on the grounds that they had been induced through physical and psychological coercion and that their use was therefore barred by the Fifth and Fourteenth Amendments. The trial court denied this motion, refusing even to conduct a hearing on it. In his closing argument, the prosecutor pointed to the 1965 confessions as evidence that petitioner was a career criminal who did not deserve to live. The jury proceeded to find two aggravating circumstances and no mitigating circumstances sufficient to preclude a sentence of death. Petitioner was sentenced to die.

In his appeal to the Illinois Supreme Court, petitioner argued that the use of his 1965 confessions without a hearing as to their voluntariness was prejudicial error. The court rejected this claim, concluding:

> "While defendant contests the voluntariness of his inculpatory statement, he does not contend that the guilty plea was involuntarily entered. This court has held that 'a constitutional right, like any other right of an accused, may be waived, and a voluntary plea of guilty waives all errors or irregularities that are not jurisdictional.' (*People* v. *Brown* (1969), 41 Ill.

*Petitioner also raises a substantial claim that the prosecutor's summation at trial falsely represented to the jury that petitioner would eventually be eligible for discretionary parole if he were to receive a life sentence. Such inaccurate representations may well have "so affect[ed] the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment," *Caldwell* v. *Mississippi*, 472 U. S., at 340, and had this Court granted certiorari, this claim would have merited its attention.

2d 503, 505 [, 244 N. E. 2d 159, 160].) Thus, the issue was waived by the voluntary plea of guilty." 105 Ill. 2d 414, 432–433, 475 N. E. 2d 840, 849 (1985).

II

The Illinois Supreme Court's harsh waiver rule stands in opposition to and must ultimately give way to the constitutional requirement that a defendant facing a death sentence be given an opportunity to challenge the reliability of all evidence urged by the prosecution in support of that sentence. Although this Court has on occasion been divided as to whether this requirement is rooted in the Due Process Clause or the Eighth Amendment, compare *Gardner* v. *Florida*, 430 U. S. 349, 358–360 (1977) (plurality opinion), with *id.*, at 362–364 (WHITE, J., concurring in judgment), a concern for reliability has been one of the central "themes . . . reiterated in our opinions discussing the procedures required by the Constitution in capital sentencing determinations," *Zant* v. *Stephens*, 462 U. S. 862, 884 (1983). See *Barefoot* v. *Estelle*, *supra*, at 924–925 (BLACKMUN, J., dissenting). This concern is squarely implicated by the introduction of confessions whose voluntariness has never been determined.

The constitutional bar to the use of involuntary confessions in criminal proceedings is based in part upon the "strongly felt attitude of our society that important human values are sacrificed where an agency of government . . . wrings a confession out of an accused against his will," *Blackburn* v. *Alabama*, 361 U. S. 199, 206–207 (1960), and upon "the deep-rooted feeling that the police must obey the law while enforcing the law," *Spano* v. *New York*, 360 U. S. 315, 320 (1959). Equally significant, however, is our awareness of "the probable unreliability of confessions that are obtained in a manner deemed coercive." *Jackson* v. *Denno*, 378 U. S. 368, 386 (1964). And if the "inherent untrustworthiness" of involuntary confessions, *Spano* v. *New York*, *supra*, at 320, requires their exclusion from the jury during trial, see *Jackson* v. *Denno*, *supra*, at 383–391, it surely forbids their introduction in a capital sentencing proceeding, where the nature of the punishment faced makes the need for reliable information "of still greater constitutional concern." *Barefoot* v. *Estelle*, *supra*, at 925 (BLACKMUN, J., dissenting).

That petitioner pleaded guilty to the 1965 crimes and made no effort to contest the voluntariness of his confessions to those

crimes has no bearing on the issue of whether the confessions were coerced. "A prospect of plea bargaining, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against [him]," *Tollett* v. *Henderson*, 411 U. S. 258, 268 (1973), are all considerations that may have led petitioner to plead guilty even while he had a compelling claim under the Fifth and Fourteenth Amendments. See *Haring* v. *Prosise*, 462 U. S. 306, 318–319 (1983). Nor does the fact that petitioner pleaded guilty establish the truth of the confessions as a whole. Even if the plea constituted an admission of the basic facts comprising the elements of the offenses charged, that admission did not necessarily extend to the truth of other aspects of the confessions. And it is the reliability of those other aspects that is at issue here because it was for them that the prosecutor is likely to have sought admission of the confessions in the first place. Had he wished only to establish petitioner's guilt of the 1965 crimes, he could have merely introduced the 1965 convictions without more.

Respondent argues that regardless of the voluntariness of petitioner's confessions, this Court should not review his claim because the Illinois Supreme Court's decision was based upon a reasonable state procedural rule. However, whether the forfeiture rule applied to preclude petitioner's claim constitutes an adequate state ground is a federal question, and if the rule does not serve a legitimate state interest it "ought not be permitted to bar vindication of important federal rights," *Henry* v. *Mississippi*, 379 U. S. 443, 448 (1965). Once a defendant has pleaded guilty, the State has a legitimate interest in barring him from attacking his conviction collaterally by asserting constitutional claims that would have been adjudicated had he stood trial. Since the plea "represents a break in the chain of events which has preceded it in the criminal process," *Tollett* v. *Henderson*, *supra*, at 267, this Court has held that such a conviction is based only on the plea itself, and not whatever might have gone before. See *Haring* v. *Prosise*, *supra*, at 321.

No such state interest supports the extension of the waiver rule to bar an attack, in a subsequent capital sentencing proceeding, on the voluntariness of a confession made by a defendant concerning a crime to which he had previously pleaded guilty. Indeed, were it not for this case, one might have reasonably assumed that a rule so clearly developed to cut off collateral attacks upon a conviction supported by a plea would be applied only in that context. The

Illinois Supreme Court's failure to give any justification for such a radical extension of the rule raises serious questions as to the legitimacy of the state interests implicated. Moreover, any interest the State may have in resolving the voluntariness of a confession soon after the alleged coercion has occurred must in this case be subordinated to the special demand for reliability imposed by the Eighth Amendment. The refusal of the trial court here to inquire into the voluntariness of petitioner's 1965 confessions outside the presence of the jury pursuant to *Jackson* v. *Denno*, *supra*, was thus error of constitutional magnitude.

Respondent contends that petitioner was not prejudiced by the introduction of the 1965 confessions because this evidence was merely cumulative, the prosecution having already offered evidence of petitioner's conviction and the confessions of two of petitioner's codefendants from that proceeding. But a confession is not merely another aggregate of factual assertions. Even before this Court decided that an involuntary confession could not be admitted at trial, it noted that "such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence." *Stein* v. *New York*, 346 U. S. 156, 192 (1953). What made the introduction of the confessions at petitioner's sentencing hearing so prejudicial is precisely the reason why the prosecution sought their admission: More damning than the information contained in them was the fact that petitioner was heard to tell of his crimes in his own words. Certainly, it cannot be said that the admission of the confessions had "no effect" on the sentencing decision as required by *Caldwell* v. *Mississippi*, 472 U. S., at 341.

Because the trial court here made no effort to determine whether statements so apparently conclusive of petitioner's character had been obtained in a manner that would cast doubt on their trustworthiness, it failed to guarantee the "reliability in the determination that death is the appropriate punishment" that this Court has demanded in capital procedures, *Woodson* v. *North Carolina*, 428 U. S., at 305. I would therefore grant certiorari and vacate petitioner's death sentence.

No. 85–10. PRESBYTERY OF BEAVER-BUTLER OF THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA ET AL. *v.* MIDDLESEX PRESBYTERIAN CHURCH ET AL. Sup. Ct. Pa. Motion of petitioners to consolidate this case with No. 84–2035,

York v. *First Presbyterian Church of Anna, supra*, denied. Certiorari denied. Reported below: 507 Pa. 255, 489 A. 2d 1317.

No. 85–186. BURLINGTON NORTHERN INC. *v.* HEROLD ET AL. C. A. 8th Cir. Motion of Association of American Railroads for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 761 F. 2d 1241.

No. 85–200. O'KANE ET AL. *v.* FORD MOTOR CO. ET AL. C. A. 3d Cir. Petition for writ of certiorari and/or prohibition denied.

No. 85–230. AUTHIER *v.* GINSBERG ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 757 F. 2d 796.

No. 85–5042. TAYLOR, A MINOR, BY HER MOTHER, TAYLOR, ET AL. *v.* O'KEEFE ET AL. C. A. 2d Cir. Motion of Victims of Crime Advocacy League of New York State, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 765 F. 2d 136.

No. 85–5102. POYNER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 229 Va. 401, 329 S. E. 2d 815.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 85–5186. SOUTH *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. JUSTICE BLACKMUN would grant the petition for writ of certiorari, vacate the judgment, and remand the case for further consideration in light of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). Reported below: 285 S. C. 529, 331 S. E. 2d 775.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Last June, this Court held it "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who

has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell* v. *Mississippi*, 472 U. S. 320, 328–329 (1985). In *Caldwell*, the prosecutor had urged the jury not to view its sentence recommendation as determining whether defendant would die because any death sentence would be reviewed by the State Supreme Court. "The argument was inaccurate, both because it was misleading as to the nature of the appellate court's review and because it depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform." *Id.*, at 336.

I believe the facts of this case similarly demand reversal. At petitioner's sentencing hearing, the prosecutor set the stage for the trial judge's instructions, noting:

> "'He will explain to you about the mitigating parts, things that the defense will say you should consider in imposing life imprisonment.
>
> "'And even behind all of that there are many safeguards built into this law. There are many many guidelines, safeguards for the defendant's benefit. And I have no problems with that. I agree with that. I want it that way.
>
> "'We are talking about the ultimate punishment. *There are even safeguards that I can't tell you about because the law says I am not suppose [sic] to tell you about them*, and I have no problems with that. I am glad it is that way.'" App. to Pet. for Cert. 12a (emphasis supplied).

The jury returned a recommendation for death, and that sentence was accordingly imposed by the trial court. On appeal, the South Carolina Supreme Court deferred to the "wide discretion" of the trial judge "regarding the propriety of the argument," *id.*, at 6a, and refused to disturb his ruling. Seven days later, this Court handed down its decision in *Caldwell*.

In *Caldwell*, the prosecutor's specificity as to the alleged safeguards allowed this Court to assess the degree to which his remarks might have led the jury to "shift its sense of responsibility to an appellate court." 472 U. S., at 330. Such an assessment is impossible here because the prosecutor's vague assurances invited jurors to speculate freely as to the extent to which they could share their duty of deciding whether petitioner should die.

Their ability to shift their responsibility was limited only by their imaginations. But there can be no doubt that, as in *Caldwell*, the argument "urged the jurors to view themselves as taking only a preliminary step toward the actual determination of the appropriateness of death—a determination which would eventually be made by others and for which the jury was not responsible." *Id.*, at 336.

The South Carolina Supreme Court asserted that any prejudice attributable to the prosecution's remarks was negated by defense counsel's arguments and the trial judge's instructions. But once the prosecutor had alluded to safeguards that he claimed could not even be disclosed to the jury, the absence of further reference to such safeguards could only corroborate, not cure. Certainly, it cannot be seriously suggested that the remarks had "no effect" upon the jury's decision to recommend that petitioner receive the death sentence. See *Caldwell*, *supra*, at 341.

Even were I to believe that the death penalty could constitutionally be imposed under certain circumstances, I would grant the petition, vacate the sentence, and remand this case to the South Carolina Supreme Court for reconsideration in light of *Caldwell*. This Court's refusal to treat like cases alike can only add to the unconstitutionally arbitrary nature of the death penalty.

Rehearing Denied

No. 81–1718. DEVEX CORP. ET AL. *v.* GENERAL MOTORS CORP., 456 U. S. 990. Motion of petitioner Technograph, Inc., for leave to file petition for rehearing denied.

No. 83–676. SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC. *v.* UNITED STATES, 465 U. S. 1005. Motion of petitioner for leave to file petition for rehearing denied. JUSTICE BLACKMUN would grant this motion.

OCTOBER 10, 1985

Dismissal Under Rule 53

No. 85–248. CRAWFORD FITTING CO. ET AL. *v.* J. T. GIBBONS, INC. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 760 F. 2d 613.

OCTOBER 11, 1985

Miscellaneous Order

No. A–280. BOWDEN *v.* KEMP, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and a petition for writ of certiorari and would vacate the death sentence in this case.

OCTOBER 12, 1985

Dismissal Under Rule 53

No. 85–5334. IN RE BELLIN. Petition for writ of mandamus dismissed under this Court's Rule 53.

OCTOBER 14, 1985

Miscellaneous Order

No. A–285 (85–5607). BOWDEN *v.* KEMP, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending the final disposition of the petition for writ of certiorari.

OCTOBER 15, 1985

Appointment of Deputy Director of Administrative Office of U. S. Courts

It is ordered that James E. Macklin, Jr., be appointed Deputy Director of the Administrative Office of the United States Courts, effective October 1, 1985, pursuant to the provisions of § 601 of Title 28 of the United States Code.

Appeals Dismissed

No. 84–921. NORTHEASTERN INTERNATIONAL AIRWAYS, INC., ET AL. *v.* FLORIDA DEPARTMENT OF REVENUE. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 457 So. 2d 1008.

No. 84-926. EASTERN AIRLINES INC. *v.* FLORIDA DEPARTMENT OF REVENUE. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 455 So. 2d 311.

No. 84-929. DELTA AIR LINES, INC. *v.* FLORIDA DEPARTMENT OF REVENUE. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 455 So. 2d 317.

No. 84-1773. PINE HILL CIVIC CLUB, INC., ET AL. *v.* DEKALB COUNTY, GEORGIA, ET AL. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 254 Ga. 20, 326 S. E. 2d 214.

No. 84-1881. HEDGES *v.* ALLINDER. Appeal from Sup. Ct. App. W. Va. dismissed for want of substantial federal question.

No. 85-417. EXOTIC COINS, INC., ET AL. *v.* BEACOM, DISTRICT ATTORNEY FOR COUNTY OF ADAMS, ET AL. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. Reported below: 699 P. 2d 930.

No. 85-19. FEIN *v.* PERMANENTE MEDICAL GROUP. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 38 Cal. 3d 137, 695 P. 2d 665.

JUSTICE WHITE, dissenting.

California Civ. Code Ann. § 3333.2 (West Supp. 1985) establishes a $250,000 maximum limitation in medical malpractice actions for "noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damage." This statute is part of the Medical Injury Compensation Act of 1975, enacted by the California Legislature in response to the dramatic rise in consumer medical costs caused by the increase in both monetary awards in medical malpractice actions and medical malpractice insurance premiums. See 1975 Cal. Stats., 2d Ex. Sess., ch. 2, § 12.5(1)(b), p. 4007.

Appellant brought a medical malpractice action against appellee, Permanente Medical Group, a partnership of physicians, for failing to diagnose and prevent a myocardial infarction. The jury awarded appellant total damages of $1,287,783, including $500,000 for noneconomic losses. The trial judge, however, pursuant to § 3333.2, reduced the amount of noneconomic damages to $250,000.

The California Supreme Court affirmed, rejecting appellant's challenge that § 3333.2 contravenes both the Due Process and Equal Protection Clauses of the Federal Constitution. 38 Cal. 3d 137, 695 P. 2d 665 (1985). The court found no due process violation based on the theory that "the Legislature retains broad control over *the measure*, as well as *the timing*, of damages that a defendant is obligated to pay and a plaintiff is entitled to receive, and . . . the Legislature may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest." *Id.*, at 158, 695 P. 2d, at 680 (emphasis in original). The court then reasoned that the limitation imposed by § 3333.2 was a rational response to the problem of rising medical malpractice insurance costs.

Similarly, the court found that § 3333.2 did not improperly discriminate either between medical malpractice plaintiffs and other tort plaintiffs, or within the class of medical malpractice plaintiffs by denying full recovery to those with noneconomic damages exceeding $250,000. The legislature's decision to limit the application of § 3333.2 to medical malpractice cases, and within those cases to those with large noneconomic damages awards, the court reasoned, was a rational response to escalating malpractice insurance rates.

California thus joins Indiana as the only two States to uphold the constitutionality of this type of medical malpractice damages limits. See *Johnson* v. *St. Vincent Hospital, Inc.*, 404 N. E. 2d 585, 598–601 (Ind. 1980). Four other States which have addressed similar damages limitations have invalidated the challenged provisions on federal constitutional grounds. *Baptist Hospital of Southeast Texas* v. *Baber*, 672 S. W. 2d 296, 298 (Tex. App. 1984) ($500,000 limit on damages other than medical expenses); *Carson* v. *Maurer*, 120 N. H. 925, 941–943, 424 A. 2d 825, 836–838 (1980) ($250,000 limit on "noneconomic" damages); *Arneson* v. *Olsen*, 270 N. W. 2d 125, 135–136 (N. D. 1978) ($300,000 limit on total damages); *Simon* v. *St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 166, 355 N. E. 2d 903, 906–907 (Com. Pl. 1976) ($200,000 limit on "general" damages).*

*In addition, at least one other court has struck down a similar medical malpractice damages cap as violative of the State's Constitution. *Wright* v. *Central Du Page Hospital Assn.*, 63 Ill. 2d 313, 329–330, 347 N. E. 2d 736, 743 (1976). Cf. *Jones* v. *State Board of Medicine*, 97 Idaho 859, 877, 555 P. 2d 399, 416–417 (1976) (remanding for factual determination on whether

One of the reasons for the division among the state courts is a question left unresolved by this Court in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59 (1978). In that case, the Court upheld the provisions of the Price-Anderson Act, 42 U. S. C. § 2210, which place a dollar limit on total liability that would be incurred by a defendant in the event of a nuclear accident. One of the objections raised against the liability limitation provisions was that they violated due process by failing to provide those injured by a nuclear accident with an adequate *quid pro quo* for the common-law right of recovery which the Act displaced. The Court noted: "It is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here . . . ." 438 U. S., at 88 (footnote omitted).

The North Dakota Supreme Court in *Arneson*, *supra*, followed *Duke Power Co.*, and refused to hold that the legislature may not limit a pre-existing right without providing a *quid pro quo*. 270 N. W. 2d, at 134–135. Nevertheless, the court went on to find that the imposition of a damages cap on malpractice claims did not provide a sufficient *quid pro quo* for the severely injured malpractice plaintiff, as his loss of recovery was offset only by lower medical costs for all recipients of medical care, and he received no specific benefit in return. *Id.*, at 136, citing *Wright* v. *Central Du Page Hospital Assn.*, 63 Ill. 2d 313, 328, 347 N. E. 2d 736, 743 (1976). This approach has been followed by the courts in Texas and New Hampshire. See *Baptist Hospital of Southeast Texas*, *supra*, at 298; *Carson*, *supra*, at 941–943, 424 A. 2d, at 837–838. In the instant case, however, the California Supreme Court concluded that "it would be difficult to say that the preservation of a viable medical malpractice insurance industry in this state was not an adequate benefit for the detriment the legislation imposes on malpractice plaintiffs." 38 Cal. 3d, at 160, n. 18, 695 P. 2d, at 681–682, n. 18.

Whether due process requires a legislatively enacted compensation scheme to be a *quid pro quo* for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus ap-

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a medical malpractice "crisis" actually existed in Idaho to justify adoption of damages limitation).

pears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several States. The issue is important, and is deserving of this Court's review. Moreover, given the continued national concern over the "malpractice crisis," it is likely that more States will enact similar types of limitations, and that the issue will recur. I find, therefore, that the federal question presented by this appeal is substantial, and dissent from the Court's conclusion to the contrary.

No. 85–37. SPENDLOVE ET AL. *v.* ANCHORAGE MUNICIPAL ZONING BOARD OF EXAMINERS AND APPEALS ET AL. Appeal from Sup. Ct. Alaska dismissed for want of jurisdiction. Reported below: 695 P. 2d 1074.

No. 85–152. THOMPSON ET AL. *v.* FIRST NATIONAL BANK & TRUST CO. Appeal from Cir. Ct. Ky., Kenton County, dismissed for want of jurisdiction.

No. 85–191. ZERMAN ET AL. *v.* AVANT GARDE CONDOMINIUM ASSN., INC., ET AL.; and ZERMAN *v.* WHITE, CLERK OF THE FLORIDA SUPREME COURT, ET AL. Appeals from Sup. Ct. Fla. dismissed for want of jurisdiction. Reported below: 466 So. 2d 218 (first case); 472 So. 2d 1182 (second case).

No. 85–123. MUKA *v.* CARTER, CHIEF DISCIPLINARY COUNSEL. Appeal from Sup. Ct. R. I. dismissed for want of a final judgment. Reported below: 491 A. 2d 334.

No. 85–309. ROUSSOS *v.* RETINA CONSULTANTS, P. C. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 61 Md. App. 717.

No. 85–5263. SMITH *v.* SCULLY. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 72 Ore. App. 184, 695 P. 2d 100.

Certiorari Granted—Vacated and Remanded

No. 85–231. BOATING INDUSTRY ASSNS. ET AL. *v.* MOORE ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U. S. 284 (1985). Reported below: 754 F. 2d 698.

No. 85–5193. YATES *v.* AIKEN, WARDEN, ET AL. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Francis* v. *Franklin*, 471 U. S. 307 (1985).

Miscellaneous Orders

No. A–207 (85–369). TUCKER *v.* HARTFORD FEDERAL SAVINGS & LOAN ASSN. Sup. Ct. Conn. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. D–493. IN RE DISBARMENT OF SURDUT. Disbarment entered. [For earlier order herein, see 471 U. S. 1114.]

No. D–501. IN RE DISBARMENT OF CHARTIER. Disbarment entered. [For earlier order herein, see 472 U. S. 1005.]

No. D–507. IN RE DISBARMENT OF ROTH. Disbarment entered. [For earlier order herein, see 472 U. S. 1024.]

No. D–518. IN RE DISBARMENT OF O'BOYLE. It is ordered that Edwards C. O'Boyle, Jr., of Peacham, Vt., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–519. IN RE DISBARMENT OF DAVIS. It is ordered that James Nelson Davis, of Daytona Beach, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–521. IN RE DISBARMENT OF KLINE. It is ordered that David L. Kline, of Lake City, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–522. IN RE DISBARMENT OF KAMINSKY. It is ordered that James Raymond Kaminsky, of Columbus, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–523. IN RE DISBARMENT OF GANTT. It is ordered that Richard Allison Gantt, of Greenville, S. C., be suspended from the

practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–524. IN RE DISBARMENT OF WETHERBEE. It is ordered that R. Michael Wetherbee, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. Motion of Massachusetts for leave to file a reply brief granted. [For earlier order herein, see, *e. g.*, *ante*, p. 808.]

No. 84–1076. TRANSCONTINENTAL GAS PIPE LINE CORP. *v.* STATE OIL AND GAS BOARD OF MISSISSIPPI ET AL. Sup. Ct. Miss. [Probable jurisdiction noted, 470 U. S. 1083.] Motion of Louisiana for leave to file a brief as *amicus curiae* out of time denied.

No. 84–1198. TEXAS *v.* MCCULLOUGH. Ct. Crim. App. Tex. [Certiorari granted, 472 U. S. 1007.] Motion of John Mann, Esquire, to permit Jeff Blackburn, Esquire, to present oral argument *pro hac vice* on behalf of respondent granted.

No. 84–1236. CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. *v.* BULLOCK. C. A. 5th Cir. [Certiorari granted, 471 U. S. 1052.] Motion of National Association of Criminal Defense Lawyers for leave to file a brief as *amicus curiae* granted.

No. 84–1274. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM *v.* DIMENSION FINANCIAL CORP. ET AL. C. A. 10th Cir. [Certiorari granted, 471 U. S. 1064.] Motion of respondents for divided argument granted. JUSTICE WHITE took no part in the consideration or decision of this motion.

No. 84–1279. DELAWARE *v.* VAN ARSDALL. Sup. Ct. Del. [Certiorari granted, 473 U. S. 923.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84–1480. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* GREENFIELD. C. A. 11th Cir. [Certiorari granted, 471 U. S. 1098.] Motion of Illinois Psychological

Association for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 84–1538. FISHER ET AL. *v.* CITY OF BERKELEY, CALIFORNIA, ET AL. Sup. Ct. Cal. [Probable jurisdiction noted, 471 U. S. 1124.] Motion of appellants for divided argument to permit California Apartment Association to present oral argument as *amicus curiae* denied.

No. 84–1554. SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS *v.* CARRIER. C. A. 4th Cir. [Certiorari granted, 473 U. S. 903.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion for appointment of counsel granted, and it is ordered that Sherman Louis Cohn, Esquire, of Washington, D. C., be appointed to serve as counsel for respondent in this case.

No. 84–1731. LORAIN JOURNAL CO. ET AL. *v.* MILKOVICH. Sup. Ct. Ohio. Motion of Ohio Newspaper Association for leave to file a brief as *amicus curiae* granted.

No. 84–1750. BALLAM *v.* UNITED STATES. C. A. 4th Cir. The Solicitor General is requested to state the views of the United States with respect to the jurisdiction of the Court of Appeals to hear the appeal in this case. See the views of the United States stated in its petition for certiorari to review *United States* v. *Squillacote*, 747 F. 2d 432 (CA7 1984), cert. denied, 471 U. S. 1016 (1985).

No. 84–6470. DAVIDSON *v.* CANNON ET AL. C. A. 3d Cir. [Certiorari granted, 471 U. S. 1134.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–82. BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY ET AL. *v.* ALTEMOSE CONSTRUCTION CO. ET AL. C. A. 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 85–273. FLORIDA *v.* ROSS. Dist. Ct. App. Fla., 4th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 85–5262. NEWBY ET AL. *v.* DEPARTMENT OF LABOR. C. A. Fed. Cir. Motion of petitioners for leave to proceed *in*

forma pauperis denied. Petitioners are allowed until November 5, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85–5319. DARDEN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. [Certiorari granted, 473 U. S. 928.] Motion of respondent to vacate stay of execution and suggestion that writ was improvidently granted is denied.

No. 85–394. IN RE TRACEY;
No. 85–5284. IN RE SANCHEZ-BERRIDI; and
No. 85–5346. IN RE KRAHN. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 84–1905. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* OWENS ET AL. Appeal from D. C. C. D. Cal. Probable jurisdiction noted.

No. 85–88. PAULUSSEN *v.* HERION. Appeal from Super. Ct. Pa. Probable jurisdiction noted. Reported below: 334 Pa. Super. 585, 483 A. 2d 892.

No. 85–117. BAKER ET AL. *v.* GENERAL MOTORS CORP. ET AL. Appeal from Sup. Ct. Mich. Probable jurisdiction noted. Reported below: 420 Mich. 463, 363 N. W. 2d 602.

No. 85–217. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO *v.* DAVIS. Appeal from Sup. Ct. Ala. Probable jurisdiction noted. Reported below: 470 So. 2d 1215.

Certiorari Granted

No. 84–1560. PRESS-ENTERPRISE CO. *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE. Sup. Ct. Cal. Certiorari granted. Reported below: 37 Cal. 3d 772, 691 P. 2d 1026.

No. 84–1717. UNITED STATES *v.* QUINN. C. A. 9th Cir. Certiorari granted. Reported below: 751 F. 2d 980.

No. 84–1744. HENDERSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. Reported below: 746 F. 2d 619.

No. 84–1777. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. *v.* BROCK, SECRETARY OF LABOR. C. A. D. C. Cir. Certiorari granted. Reported below: 241 U. S. App. D. C. 106, 746 F. 2d 839.

No. 84–1809. FEDERAL TRADE COMMISSION *v.* INDIANA FEDERATION OF DENTISTS. C. A. 7th Cir. Certiorari granted. Reported below: 745 F. 2d 1124.

No. 84–1973. THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION *v.* WOLD ENGINEERING, P. C., ET AL. Sup. Ct. N. D. Certiorari granted. Reported below: 364 N. W. 2d 98.

No. 85–195. ICICLE SEAFOODS, INC. *v.* WORTHINGTON ET AL. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 774 F. 2d 349.

No. 85–246. UNITED STATES *v.* DION. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 762 F. 2d 674.

No. 84–6859. SKIPPER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question I presented by the petition. Reported below: 285 S. C. 42, 328 S. E. 2d 58.

Certiorari Denied. (See also Nos. 85–309 and 85–5263, *supra*.)

No. 84–1805. TULALIP TRIBES OF WASHINGTON ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 1367.

No. 84–1877. STEARNS CO. ET AL. *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL.; and

No. 84–1938. GABRIEL ENERGY CORP. *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 753 F. 2d 521.

No. 84–1880. CITY OF ALCOA ET AL. *v.* MYERS, ON BEHALF OF HERSELF AND HER THREE MINOR CHILDREN, DIXON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 752 F. 2d 196.

No. 84–1996. TRUCK DRIVERS LOCAL 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 5.

No. 84–6784. YATER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 2d 1058.

No. 84–6821. GRACE *v.* GOLDEN ET AL. C. A. 11th Cir. Certiorari denied.

No. 84–6822. GRACE *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 84–6828. VILLANUEVA *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 695 P. 2d 858.

No. 84–6846. KIRBY *v.* UNITED STATES;
No. 84–6935. GREENSPUN *v.* UNITED STATES; and
No. 84–6949. BALCHAITIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 758 F. 2d 879.

No. 84–6921. KRAMSVOGEL *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 124 Wis. 2d 101, 369 N. W. 2d 145.

No. 84–6952. KEPREOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 759 F. 2d 961.

No. 85–71. LOCALS 666 AND 780 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES ET AL. *v.* UNITED STATES DEPARTMENT OF LABOR ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 141.

No. 85–76. GRAHAM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 758 F. 2d 879.

No. 85–81. CHRISTMANN & WELBORN *v.* UNITED STATES DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 773 F. 2d 317.

No. 85–94. ZIMMER PAPER PRODUCTS INC. *v.* BERGER & MONTAGUE, P. C., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 758 F. 2d 86.

No. 85–115. NATIONAL FREIGHT, INC., ET AL. *v.* LARSON, SECRETARY OF TRANSPORTATION OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 499.

No. 85–122. FIRST CITIZENS BANK OF BILLINGS *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 397.

No. 85–131. LEWIS *v.* BLACKBURN, CLERK OF SUPERIOR COURT FOR MECKLENBURG COUNTY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 759 F. 2d 1171.

No. 85–156. HOOVER ET AL. *v.* DOLE, SECRETARY OF TRANSPORTATION, ET AL. Sp. Ct. R. R. R. A. Certiorari denied. Reported below: 613 F. Supp. 374.

No. 85–163. BALAIR, LTD., ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 43, 762 F. 2d 137.

No. 85–254. KEARNEY & TRECKER CORP. *v.* GULF SOUTH MACHINE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 2d 377.

No. 85–256. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* ST. JAMES HOSPITAL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 1460.

No. 85–261. BINLADEN BSB LANDSCAPING *v.* M. V. "NEDLLOYD ROTTERDAM." C. A. 2d Cir. Certiorari denied. Reported below: 759 F. 2d 1006.

No. 85–264. ARAGON *v.* LOCAL NO. 572, INTERNATIONAL BROTHERHOOD OF TEAMSTERS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 750 F. 2d 1447.

No. 85–265. HALLSTROM ET AL. *v.* STIVERS ET AL. Sup. Ct. Idaho. Certiorari denied.

No. 85–266. WILCO MARSH BUGGIES & DRAGLINES, INC., ET AL. *v.* KORI CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 761 F. 2d 649.

No. 85–267. MATRIX ENTERPRISES, INC., ET AL. *v.* MILLINGTON TELEPHONE CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 653.

No. 85–268. MITSUI & CO. (U. S. A.), INC., ET AL. *v.* WESTERN CONCRETE STRUCTURES CO., INC. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 1013.

No. 85–271. CALIFORNIA *v.* WALNUT PROPERTIES, INC., ET AL. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 85–272. ARROW NORTHWEST, INC., ET AL. *v.* GREATER HOUSTON TRANSPORTATION CO., DBA YELLOW CAB CO., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 760 F. 2d 607.

No. 85–275. GAY *v.* COATS & CLARK, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 1506.

No. 85–280. LAWHORN ET UX. *v.* KING. C. A. 4th Cir. Certiorari denied. Reported below: 765 F. 2d 139.

No. 85–283. ARGUS CHEMICAL CORP. *v.* FIBRE GLASS-EVERCOAT CO., INC. C. A. Fed. Cir. Certiorari denied. Reported below: 759 F. 2d 10.

No. 85–284. HAYES *v.* CANNON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1081.

No. 85–285. PEIL *v.* SPORCK. C. A. 3d Cir. Certiorari denied. Reported below: 759 F. 2d 312.

No. 85–286. BEARY *v.* WEST PUBLISHING CO. C. A. 2d Cir. Certiorari denied. Reported below: 763 F. 2d 66.

No. 85–288. DEANE ET AL. *v.* THOMSON MCKINNON SECURITIES, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 43, 762 F. 2d 137.

No. 85–292. BECKHAM *v.* HARRIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 756 F. 2d 1032.

No. 85–293. OZARK AIR LINES, INC. *v.* AIR LINE PILOTS ASSN., INTERNATIONAL. C. A. 8th Cir. Certiorari denied. Reported below: 761 F. 2d 1259.

No. 85–296. GEISLER *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 10 Kan. App. 2d xliv.

No. 85–297. BIEKER *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 10 Kan. App. 2d xliii, 700 P. 2d 148.

No. 85–302. MONTGOMERY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 467 So. 2d 972.

No. 85–305. FRYZEL, DIRECTOR, DEPARTMENT OF FINANCIAL INSTITUTIONS *v.* CASH CURRENCY EXCHANGE, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 762 F. 2d 542.

No. 85–310. MONTGOMERY WARD & CO., INC. *v.* DABNEY. C. A. 8th Cir. Certiorari denied. Reported below: 761 F. 2d 494.

No. 85–313. CAVROS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 196 Conn. 519, 494 A. 2d 550.

No. 85–315. ITALIANO *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 18 Ohio St. 3d 38, 479 N. E. 2d 857.

No. 85–317. HESTNES ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 762 F. 2d 1015.

No. 85–323. B & G CRANE SERVICE, INC. *v.* DOLPHIN TITAN INTERNATIONAL, INC. C. A. 5th Cir. Certiorari denied. Reported below: 762 F. 2d 1292.

No. 85–325. BRUSCANTINI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 640.

No. 85–327. WARD *v.* L & C MARINE TRANSPORT, LTD. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 1457.

No. 85–336. EUBANKS *v.* O'BRIEN ET AL. Ct. App. Colo. Certiorari denied. Reported below: 701 P. 2d 614.

No. 85–339. JOHNSTON *v.* DOWLING ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 145.

No. 85–341. VILLARREAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 764 F. 2d 1048.

No. 85–344. DUTKA *v.* DEPARTMENT OF THE TREASURY. C. A. Fed. Cir. Certiorari denied.

No. 85–347. JACOB *v.* ATTORNEY GRIEVANCE COMMISSION OF MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 303 Md. 172, 492 A. 2d 905.

No. 85–352. NORTH AMERICAN REPORTING, INC., ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 238 U. S. App. D. C. 300, 740 F. 2d 50.

No. 85–355. BROWN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 763 F. 2d 984.

No. 85–396. DUFF *v.* VIRGINIA. Cir. Ct. Rockingham County, Va. Certiorari denied.

No. 85–418. CRAWFORD, SPECIAL ADMINISTRATRIX OF THE ESTATES OF PAWLISA ET AL. *v.* EDMONSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 764 F. 2d 479.

No. 85–427. MCGEE *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF BRUNSWICK. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 647.

No. 85–433. BISIG *v.* UNITED STATES;
No. 85–5330. GREEN *v.* UNITED STATES;
No. 85–5368. HARDIN *v.* UNITED STATES; and
No. 85–5379. HARDIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85–443. KWIATECKI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 914.

No. 85–450. BRIDGEPORT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 277.

No. 85–452. DALE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied.

No. 85–5025. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 830.

No. 85–5062. GRIFFIN *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 85–5073. ALONGI *v.* UNITED STATES; and
No. 85–5134. MUSTACCHIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 759 F. 2d 1099.

No. 85–5149. FUENTES *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 64 N. Y. 2d 993, 478 N. E. 2d 203.

No. 85–5226. WILLIAMS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 483 A. 2d 292.

No. 85–5231. TURNER *v.* MORRIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 277.

No. 85–5246. DELESPINE *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85–5247. ENRIQUEZ *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 449 So. 2d 845.

No. 85–5250. STURM *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 85–5252. SANFORD *v.* BRADLEY, JUDGE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 85–5256. MOORE *v.* ORNER, SHAYNE & REIZNER, INC. C. A. 7th Cir. Certiorari denied.

No. 85–5266. IN RE BAKER. Ct. App. Wash. Certiorari denied.

No. 85–5269. STEWART *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 123 Wis. 2d 547, 371 N. W. 2d 375.

No. 85–5274. WILLIAMS *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 1001.

No. 85–5279. GOLDMAN *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 395 Mass. 495, 480 N. E. 2d 1023.

No. 85–5280. KALTENBACH *v.* ACADIAN METROPOLITAN CODE AUTHORITY. Ct. App. La., 3d Cir. Certiorari denied.

No. 85-5281. GREIF ET AL. *v.* CITY OF BEDFORD, OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1007.

No. 85-5282. WELCH *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 85-5289. AGUILERA *v.* COOK COUNTY POLICE AND CORRECTIONS MERIT BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 844.

No. 85-5294. MCAFEE *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 761 F. 2d 1124.

No. 85-5296. CODER *v.* GRINE ET AL. C. A. 3d Cir. Certiorari denied.

No. 85-5297. KOSYLA *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 1168, 481 N. E. 2d 365.

No. 85-5300. WILSON *v.* BARNES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 909.

No. 85-5303. HOWARD *v.* RADIO CORPORATION OF AMERICA ET AL. C. A. 7th Cir. Certiorari denied.

No. 85-5305. FARRIS *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 177.

No. 85-5315. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 762 F. 2d 1222.

No. 85-5324. MASTERS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 656.

No. 85-5340. LOVELACE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1166.

No. 85-5341. ARBELAEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85-5342. BEARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 1477.

No. 85–5357. BROWN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85–5363. GILLIS *v.* ORR, SECRETARY OF THE UNITED STATES AIR FORCE. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 998.

No. 85–5364. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 766 F. 2d 1452.

No. 85–5369. BLANDON-GAVIRIA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85–5377. STAPLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 763 F. 2d 415.

No. 85–5382. WALLACE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 1001.

No. 85–5383. LAZARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 916.

No. 85–5390. REVELS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 926.

No. 85–5391. BRISBON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 106 Ill. 2d 342, 478 N. E. 2d 402.

No. 85–5396. POINTER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 85–5407. FAULISI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1167.

No. 85–5410. VEATCH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1077.

No. 85–5416. HARRELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 754 F. 2d 1153.

No. 85–5420. MARSHALL ET AL. *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 491 A. 2d 554.

No. 85–5423. SWAIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 173.

No. 85–5429. SWEENEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 150.

No. 85–5435. COMO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 935.

No. 85–5442. HAWES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 2d 1352.

No. 84–1699. PUBLIC SERVICE COMPANY OF INDIANA, INC. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Motion of National Association of Regulatory Utility Commissioners for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 242 U. S. App. D. C. 75, 749 F. 2d 753.

No. 84–1738. SACKETT-CHICAGO, INC. *v.* MIDGETT. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* denied. Certiorari denied. Reported below: 105 Ill. 2d 143, 473 N. E. 2d 1280.

No. 84–1821. FORD, WARDEN *v.* FORD. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 749 F. 2d 681.

No. 84–1857. LUCKER ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. JUSTICE WHITE and JUSTICE POWELL would grant certiorari. Reported below: 765 F. 2d 161.

No. 85–65. SHANGHAI POWER CO. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. JUSTICE WHITE and JUSTICE POWELL would grant certiorari. Reported below: 765 F. 2d 159.

No. 84–1925. NATIONAL TREASURY EMPLOYEES UNION ET AL. *v.* O'CONNOR, SPECIAL COUNSEL, MERIT SYSTEMS PROTECTION BOARD. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 241 U. S. App. D. C. 311, 747 F. 2d 748.

No. 84–1928. PACIFIC EMPLOYERS INSURANCE CO. *v.* M/V CAPT. W. D. CARGILL ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 751 F. 2d 801.

JUSTICE WHITE, dissenting.

In this case, the United States Court of Appeals for the Fifth Circuit held, respecting the District Court's dismissal of a declaratory action, that review is limited to the question of whether the District Court abused its discretion. 751 F. 2d 801, 804 (1985).

This standard of review conflicts with that adopted by other Courts of Appeals. See, *e. g.*, *Bilbrey* v. *Brown*, 738 F. 2d 1462, 1470 (CA9 1984) (whether a district court properly exercised its discretion to grant declaratory relief is subject to more searching review on appeal than under the "abuse of discretion" standard); *International Harvester Co.* v. *Deere & Co.*, 623 F. 2d 1207, 1217 (CA7 1980) (a court of appeals, in deciding whether jurisdiction should be taken in a declaratory action, does not defer to the judgment of the district court, but must exercise its own sound discretion). I would grant certiorari to resolve this conflict among the Courts of Appeals.

No. 84–2016. GREYHOUND LINES, INC. *v.* WILHITE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 278.

JUSTICE WHITE, dissenting.

In this case, the United States Court of Appeals for the Ninth Circuit held that *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983) (actions brought under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185, are governed by the 6-month statute of limitations provided in § 10(b) of the National Labor Relations Act, 29 U. S. C. § 160(b)), was not to be applied retroactively because such retroactive application would shorten the applicable limitations period. Cf. *Glover* v. *United Grocers, Inc.*, 746 F. 2d 1380 (CA9 1984) (applying *DelCostello* retroactively when doing so lengthened time for filing). In so holding, the Court of Appeals followed a prior decision in that court that relied on the factors outlined in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971), in deciding this retroactivity question. See *Barina* v. *Gulf Trading & Transportation Co.*, 726 F. 2d 560, 563–564 (CA9 1984).

The decision below conflicts with those in other Circuits which have held that *DelCostello* should be applied retroactively. See, *e. g.*, *Smith* v. *General Motors Corp.*, 747 F. 2d 372 (CA6 1984) (en banc); *Graves* v. *Smith's Transfer Corp.*, 736 F. 2d 819 (CA1 1984). Other Circuits have also held that the *Huson* analysis is not necessary to determine whether retroactivity is appropriate in this context. See, *e. g.*, *Welyczko* v. *U. S. Air, Inc.*, 733 F. 2d 239 (CA2), cert. denied, 469 U. S. 1036 (1984); *Smith*, *supra*. I would grant certiorari to resolve these conflicts.

No. 84–2034. SAVILLE *v.* WESTINGHOUSE ELECTRIC CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 261.

JUSTICE WHITE, dissenting.

In this case, the United States Court of Appeals for the Third Circuit held that *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983) (actions brought under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185, are governed by the 6-month statute of limitations provided in § 10(b) of the National Labor Relations Act, 29 U. S. C. § 160(b)), applies retroactively. In so holding, the Court of Appeals followed a prior decision in that court which relied on the factors outlined in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971), in making that retroactivity determination. See *Perez* v. *Dana Corp., Parish Frame Div.*, 718 F. 2d 581 (CA3 1983). For the reasons stated in my dissent in *Greyhound Lines, Inc.* v. *Wilhite*, *ante*, p. 910, I would grant certiorari in this case.

No. 84–6962. CAPE *v.* FRANCIS, WARDEN. C. A. 11th Cir.;
No. 84–6975. ALDERMAN *v.* GEORGIA. Sup. Ct. Ga.; and
No. 85–5171. WILSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: No. 84–6962, 741 F. 2d 1287; No. 84–6975, 254 Ga. 206, 327 S. E. 2d 168; No. 85–5171, 467 So. 2d 503.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85–5116. LUCAS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 105 App. Div. 2d 545, 481 N. Y. S. 2d 789.

JUSTICE WHITE, dissenting.

The issue presented in this case is whether the prohibition established in *New Jersey* v. *Portash*, 440 U. S. 450 (1979), against using a statement obtained from a criminal defendant in violation of his Fifth Amendment right against self-incrimination for im-

peachment purposes applies equally to statements taken in violation of the Sixth Amendment right to counsel. The United States Court of Appeals for the Second Circuit in *United States* v. *Brown*, 699 F. 2d 585 (1983), and the Tenth Circuit in *United States* v. *McManaman*, 606 F. 2d 919 (1979) (pre-*Portash*), have answered this question in the affirmative. The Appellate Division of the Supreme Court of New York in the present case, 105 App. Div. 2d 545, 481 N. Y. S. 2d 789 (1984), and the New York Court of Appeals in *New York* v. *Ricco*, 56 N. Y. 2d 320, 437 N. E. 2d 1097 (1982), however, have given the opposite answer. I would grant certiorari to resolve this conflict.

Rehearing Denied

No. 84–6738. SHAHRYAR *v.* MARTIN, WARDEN, 472 U. S. 1031. Motion for leave to file petition for rehearing denied.

OCTOBER 18, 1985

Dismissal Under Rule 53

No. 85–304. CURTIS *v.* DOUBLEDAY & CO., INC. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 763 F. 2d 495.

OCTOBER 21, 1985

Appeals Dismissed

No. 84–2011. OETTINGER *v.* OETTINGER. Appeal from Ct. App. La., 2d Cir., dismissed for want of substantial federal question. Reported below: 463 So. 2d 875.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

Appellant Albert Oettinger and appellee Leona Gordon Oettinger were married in Louisiana in 1967. Both had been married before, and both had substantial property of their own at the time of the marriage. Unbeknownst to appellant, at the time of the marriage appellee recorded a declaration of paraphernality under the authority of Article 2386 of the Louisiana Civil Code. This declaration allowed a wife to reserve for herself any fruits from her paraphernal property (nondotal property she brought into the marriage); it also gave her the right to manage such property and the fruits from such property. See La. Civ. Code Ann., Art.

2386 (West 1971).* Under the Louisiana marital property laws in effect at that time, the husband would, absent such a declaration, have the right to manage the fruits of the wife's paraphernal property, and those fruits would thus normally fall into the community property. See La. Civ. Code Ann., Arts. 2402, 2404 (West 1971).

Under Louisiana law at that time, no similar provision existed for the husband. For a husband to reserve the fruits of his separate property to himself, he had to *prove* that they were separate property; a simple declaration was not possible for him. See La. Civ. Code Ann., Art. 2405 (West 1971). Thus, although a husband had the right to manage his separate property (because he had the right under law, with certain exceptions, to manage all separate and community property), the fruits from that property that accrued during the marriage would normally become community property.

During their marriage, appellant and appellee attempted to maintain their finances separately. In 1980, they were divorced. In 1982, appellee sued for a partition of former community property and for settlement of the former community. Appellant, mindful of this Court's recent gender-discrimination decisions, see, *e. g.*, *Orr* v. *Orr*, 440 U. S. 268 (1979), challenged inclusion in the community of the property that he had brought into the marriage and of the fruits from that property on the ground that the Louisiana Civil Code provision that allowed the wife but not the husband to reserve the fruits of such property to herself by a mere declaration of paraphernality was an unconstitutional denial of equal protection. That provision, Article 2386, had been repealed by the

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*Article 2386 stated:

"The fruits of the paraphernal property of the wife, wherever the property be located and however administered, whether natural, civil, including interest, dividends and rents, or from the result of labor, fall into the conjugal partnership, if there exists a community of acquets and gains; unless the wife, by written instrument, shall declare that she reserves all of such fruits for her own separate use and benefit and her intention to administer such property separately and alone. The said instrument shall be executed before a Notary Public and two witnesses and duly recorded in the Conveyance Records of the Parish where the community is domiciled.

"If there is no community of gains, each party enjoys, as he chooses, that which comes to his hand; but the fruits and revenues which are existing at the dissolution of the marriage, belong to the owner of the things which produce them."

Louisiana Legislature in 1979, but appellee's declaration effected under it in 1967 remained valid.

The state trial court considered and rejected appellant's constitutional argument. The trial court noted that the laws effective in 1967 gave the husband, without any action on his part or his wife's part, the ability to manage the community property, his separate property, and her separate property. Although the law did discriminate on the basis of sex, the trial court held that the paraphernality provision was substantially related to important governmental objectives. Specifically, the trial court held that the purpose of Article 2386 had been to "suppl[y] the wife with a limited degree of protection with respect to her separate property against her husband." App. to Juris. Statement B–3.

On appeal from this decision, the Louisiana Court of Appeal cited the legal standard set forth by this Court for addressing gender-discrimination cases, *i. e.*, a gender classification must be substantially related to an important governmental interest, noted the various gender-discrimination cases of this Court—some of which upheld gender-based classifications and some of which struck them down—and concluded that the challenged provision was substantially related to the important state interest of "allowing wives an opportunity to manage their own separate property on an equal basis with their husbands." 463 So. 2d 875, 878 (1985). The Court of Appeal concluded that any law attempting to equalize the status of wives and husbands could not be unconstitutional. The Supreme Court of Louisiana denied appellant's application for a writ of certiorari. 466 So. 2d 467 (1985).

In his jurisdictional statement, appellant again asserts that the application of former Article 2386 constitutes a violation of equal protection. I believe that this argument presents a substantial federal question. Article 2386 treated husbands and wives differently. The only justification for this differential treatment that appears in the record was that of allowing the wife some parity in the management of her separate property. To begin with, this justification assumes that the overall statutory scheme governing the management of marital property, under which the husband is the automatic manager of all property owned by the spouses together or separately, is seriously suspect under our prior decisions in this area. See, *e. g.*, *Kirchberg* v. *Feenstra*, 450 U. S. 455 (1981); *Orr* v. *Orr*, *supra*. I believe that there is

a substantial federal question as to whether a facially discriminatory provision may be justified on the ground that it is a remedial exception to an overall statutory scheme that is constitutionally defective. See *Parham* v. *Hughes*, 441 U. S. 347, 361–368 (1979) (WHITE, J., dissenting).

Further, I do not see that such a justification, even assuming its validity, can support a provision that enables a wife not only to manage the fruits of her paraphernal property but also to keep those fruits separate from the community property with a mere declaration, which latter ability is not given to her husband. I thus believe that there is also a substantial question as to whether the justification, even if valid, is adequately tailored to the asserted governmental interest.

Nor do I believe that the fact that Article 2386 is no longer in effect should prevent our considering this issue. Although it has been repealed, former Article 2386 remains relevant with respect to declarations filed before that date. Further, we have previously considered the application of a statutory scheme which had been repealed prior to our decision. See, *e. g.*, *Kirchberg*, *supra*, at 459, n. 6. I do not believe that this fact renders the federal question presented by this case insubstantial. Consequently, I would note probable jurisdiction.

No. 85–118. TRUMP ET AL. *v.* CHU, COMMISSIONER OF NEW YORK STATE TAX COMMISSION. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 65 N. Y. 2d 20, 478 N. E. 2d 971.

No. 85–446. ROBERTS ENTERPRISES, INC. *v.* SECRETARY OF TRANSPORTATION OF KANSAS. Appeal from Sup. Ct. Kan. dismissed for want of substantial federal question. Reported below: 237 Kan. 276, 699 P. 2d 479.

No. 85–159. REMMENGA ET UX. *v.* CALIFORNIA COASTAL COMMISSION. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. THE CHIEF JUSTICE, JUSTICE BRENNAN, and JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 163 Cal. App. 3d 623, 209 Cal. Rptr. 628.

No. 85–204. CHICAGO TRIBUNE CO. ET AL. *v.* JOHNSON, DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE, ET AL. Appeal

from Sup. Ct. Ill. dismissed for want of substantial federal question. JUSTICE WHITE, JUSTICE STEVENS, and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. Reported below: 106 Ill. 2d 63, 477 N. E. 2d 482.

No. 85–330. GLENWOOD T. V., INC., ET AL. *v.* RATNER, COMMISSIONER, DEPARTMENT OF CONSUMER AFFAIRS OF THE CITY OF NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 65 N. Y. 2d 642, 481 N. E. 2d 252.

No. 85–375. LUPERT *v.* CALIFORNIA STATE BAR ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 761 F. 2d 1325.

Certiorari Granted—Vacated and Remanded

No. 85–278. HUTTO, INDIVIDUALLY AND AS STATE CORRECTIONS COMMISSIONER, ET AL. *v.* JONES ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals with instructions to dismiss the appeal for want of a final judgment. *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U. S. 737, 742–745 (1976). Reported below: 763 F. 2d 979.

Certiorari Dismissed

No. 85–172. CATALDO *v.* MESKILL, JUDGE, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT. C. A. 2d Cir. Certiorari dismissed for want of jurisdiction.

Miscellaneous Orders

No. – – ——. DEAN *v.* UNITED STATES. Motion to direct the Clerk to waive the Rules and file the petition for writ of certiorari denied.

No. A–232 (85–5403). HANDLEY ET AL. *v.* UNITED STATES. C. A. 11th Cir. Application to recall and stay mandate, addressed to JUSTICE WHITE and referred to the Court, denied.

No. D–497. IN RE DISBARMENT OF MOORE. Disbarment entered. [For earlier order herein, see 471 U. S. 1133.]

No. D–505. IN RE DISBARMENT OF HURD. Disbarment entered. [For earlier order herein, see 472 U. S. 1024.]

No. D–525. IN RE DISBARMENT OF PHELPS. It is ordered that Robert Edward Phelps, Jr., of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–526. IN RE DISBARMENT OF DOBBS. It is ordered that Hubert Lee Dobbs, Jr., of Phoenix, Ariz., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–527. IN RE DISBARMENT OF MANN. It is ordered that Michael Benjamin Mann, of Panama City, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 104, Orig. NEW JERSEY *v.* NEVADA ET AL. Motion to expedite consideration of motion for leave to file bill of complaint denied. Motion for preliminary injunction denied. Motion for leave to file bill of complaint granted and defendants allowed 60 days within which to answer.

No. 84–1661. KIMMELMAN, ATTORNEY GENERAL OF NEW JERSEY, ET AL. *v.* MORRISON. C. A. 3d Cir. [Certiorari granted, *ante*, p. 815.] Motion for appointment of counsel granted, and it is ordered that William E. Staehle, Esquire, of Chatham, N. J., be appointed to serve as counsel for respondent in this case.

Probable Jurisdiction Noted or Postponed

No. 84–2015. MACDONALD, SOMMER & FRATES *v.* COUNTY OF YOLO ET AL. Appeal from Ct. App. Cal., 3d App. Dist. Probable jurisdiction noted.

No. 84–1903. POSADAS DE PUERTO RICO ASSOCIATES, DBA CONDADO HOLIDAY INN *v.* TOURISM COMPANY OF PUERTO RICO ET AL. Appeal from Sup. Ct. P. R. Further consideration of question of jurisdiction postponed to hearing of case on the merits.

Certiorari Granted

No. 85–224. CITY OF RIVERSIDE ET AL. *v.* RIVERA ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 763 F. 2d 1580.

No. 85–289. UNITED STATES DEPARTMENT OF TRANSPORTATION ET AL. *v.* PARALYZED VETERANS OF AMERICA ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 243 U. S. App. D. C. 237, 752 F. 2d 694.

No. 85–363. NEW YORK *v.* P. J. VIDEO, INC., DBA NETWORK VIDEO, ET AL. Ct. App. N. Y. Certiorari granted. Reported below: 65 N. Y. 2d 566, 483 N. E. 2d 1120.

No. 84–1972. FEDERAL DEPOSIT INSURANCE CORPORATION *v.* PHILADELPHIA GEAR CORP. C. A. 10th Cir. Motion of Council on International Banking, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 751 F. 2d 1131.

No. 85–162. NEW MEXICO *v.* EARNEST. Sup. Ct. N. M. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 103 N. M. 95, 703 P. 2d 872.

No. 85–410. MEMPHIS COMMUNITY SCHOOL DISTRICT ET AL. *v.* STACHURA. C. A. 6th Cir. Certiorari granted limited to Questions I and III presented by the petition. Reported below: 763 F. 2d 211.

No. 85–5487. SMITH *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 769 F. 2d 170.

Certiorari Denied. (See also Nos. 85–330 and 85–375, *supra.*)

No. 84–1826. PREVATTE *v.* GIBSON, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 84–1845. SORENSEN *v.* FITZGERALD, TRUSTEE. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 20.

No. 84–1872. CONSOLIDATED RAIL CORPORATION *v.* HALLAMORE MOTOR TRANSPORTATION, INC. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 394 Mass. 56, 473 N. E. 2d 1137.

No. 84–1919. PARKS ET AL. *v.* BELLETIRE, DIRECTOR, DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABIL-

ITIES, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1397.

No. 84–1930. MONTANA *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 242 U. S. App. D. C. 62, 749 F. 2d 740.

No. 84–2018. DIALAMERICA MARKETING, INC. *v.* BROCK, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 757 F. 2d 1376.

No. 84–6994. SHELOR *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 84–7005. ABDULLAH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 108 App. Div. 2d 817, 485 N. Y. S. 2d 330.

No. 84–7006. HOOPER *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 103 Wash. 2d 1029.

No. 85–18. PITTSBURGH TERMINAL CORP. ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 260.

No. 85–27. LOS ANGELES UNIFIED SCHOOL DISTRICT ET AL. *v.* LOS ANGELES NAACP ET AL.; and

No. 85–213. LOS ANGELES BRANCH NAACP ET AL. *v.* LOS ANGELES UNIFIED SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 750 F. 2d 731.

No. 85–96. AIELLO ET AL. *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 394 Mass. 727, 477 N. E. 2d 972.

No. 85–201. LOVINGER *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 130 Ill. App. 3d 105, 473 N. E. 2d 980.

No. 85–308. ANDERSON COUNTY, TENNESSEE, ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 761 F. 2d 1169.

No. 85–312. BOHEMIA, INC., ET AL. *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1482.

No. 85–322. EAGLE BOOKS, INC. *v.* JONES ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 130 Ill. App. 3d 407, 474 N. E. 2d 444.

No. 85–326. GOLDBERG ET AL. *v.* UNITED PARCEL SERVICE OF AMERICA, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 907.

No. 85–328. WARNICK ET AL. *v.* JIN CHA ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: 476 N. E. 2d 109.

No. 85–338. REDIC *v.* SCHWARTZ. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 1181.

No. 85–340. HART SCHAFFNER & MARX ET AL. *v.* NATURAL FOOTWEAR, LTD., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 1383.

No. 85–348. VAL/DEL, INC. *v.* SUPERIOR COURT OF ARIZONA, PIMA COUNTY, ET AL. (PASCUA YAQUI TRIBE, REAL PARTY IN INTEREST). Ct. App. Ariz. Certiorari denied. Reported below: 145 Ariz. 558, 703 P. 2d 502.

No. 85–354. ORTHO PHARMACEUTICAL CORP. *v.* MACDONALD ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 394 Mass. 131, 475 N. E. 2d 65.

No. 85–357. JOHNSON *v.* JOHNSON ET AL. Ct. App. Mich. Certiorari denied.

No. 85–368. SEIBOLD *v.* UNR-ROHN CO. C. A. 7th Cir. Certiorari denied.

No. 85–369. TUCKER *v.* HARTFORD FEDERAL SAVINGS & LOAN ASSN. Sup. Ct. Conn. Certiorari denied. Reported below: 196 Conn. 172, 491 A. 2d 1084.

No. 85–402. AWREY *v.* PROGRESSIVE CASUALTY INSURANCE CO. C. A. 6th Cir. Certiorari denied. Reported below: 728 F. 2d 352.

No. 85–404. SHELTON ET UX. *v.* WASHINGTON ET AL. Ct. App. Wash. Certiorari denied.

No. 85–412. WRIGHT *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1078.

No. 85–416. SCAGLIONE *v.* COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1395, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 759 F. 2d 201.

No. 85–448. ATWELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 766 F. 2d 416.

No. 85–486. BOYKIN *v.* REAGAN ADMINISTRATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 907.

No. 85–496. WOOLARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 768 F. 2d 1349.

No. 85–505. ZOELLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 922.

No. 85–5074. TAFOYA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 757 F. 2d 1522.

No. 85–5098. MARRAPESE *v.* RHODE ISLAND ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 749 F. 2d 934.

No. 85–5112. RICKUS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1077.

No. 85–5195. GREEN *v.* SCHWARZER, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied.

No. 85–5309. ROBINSON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 497 A. 2d 790.

No. 85–5314. GREEN *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 85–5316. WILSON *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1078.

No. 85–5317. COLE *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied. Reported below: 758 F. 2d 124.

No. 85–5320. DEACON *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 130 Ill. App. 3d 280, 473 N. E. 2d 1354.

No. 85–5321. COLE *v.* BENSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 760 F. 2d 226.

No. 85–5326. PICKARD *v.* ANGELONE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85–5327. PITT *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 110 App. Div. 2d 723, 488 N. Y. S. 2d 38.

No. 85–5328. SHAW *v.* WOODARD, SECRETARY, NORTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. Ct. App. N. C. Certiorari denied. Reported below: 75 N. C. App. 363, 331 S. E. 2d 330.

No. 85–5335. MABIN *v.* HOWARD UNIVERSITY. Ct. App. D. C. Certiorari denied.

No. 85–5338. COLLINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 656.

No. 85–5345. FELLS *v.* SNYDER ET AL. C. A. 3d Cir. Certiorari denied.

No. 85–5352. SANDERS *v.* JUNIOR COLLEGE DISTRICT OF METROPOLITAN KANSAS CITY, MISSOURI. C. A. D. C. Cir. Certiorari denied.

No. 85–5358. GORHAM *v.* FRANZEN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 786.

No. 85–5385. DAY *v.* BLACK, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 85–5392. CHAGRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 754 F. 2d 1186.

No. 85–5409. GOBELY *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 366 N. W. 2d 600.

No. 85–5413. PETRILLO *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 85–5419. HAYES *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 2d 1247.

No. 85–5440. FRAZIER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 914.

No. 85–5453. CORCORAN *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 757 F. 2d 207.

No. 85–5456. BODINE *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1059.

No. 85–5458. HILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 766 F. 2d 856.

No. 85–5460. IRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 171.

No. 85–5462. SPIVEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 2d 1352.

No. 85–5464. PETERSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 768 F. 2d 64.

No. 85–5470. LATHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85–5472. ESDAILLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 769 F. 2d 104.

No. 85–5482. BARRETT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 766 F. 2d 609.

No. 84–1584. BONNER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 84–1810. GLADNEY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 745 F. 2d 955.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN and JUSTICE POWELL join, dissenting.

Section 4945 of the Internal Revenue Code, 26 U. S. C. § 4945, imposes a substantial excise tax on noncharitable expenditures by a private foundation. Transfers remain taxable under this section only as long as the organization retains its foundation status. Upon the termination of that status, tax liability is assessed pursuant to § 507(c). Petitioners are trustees and residuary legatees of a testamentary trust established in 1905 and later organized as a private foundation. In 1971, a Louisiana court ordered the dis-

solution of the trust and the distribution of its remaining assets to the settlor's heirs. The Internal Revenue Service acknowledged that the trust's § 507(c) liability was zero. Nonetheless, viewing the distributions as § 4945 "taxable expenditures" by a still extant foundation, it imposed a 100% excise tax on the transfer. Petitioners contested liability, and an action in Tax Court ensued. Concluding that the trust's private foundation status terminated upon the issuance of the state court judgment, the court found for petitioners. 45 TCM 280, ¶ 82–707 P–H Memo TC (1982). A divided panel of the Court of Appeals for the Fifth Circuit reversed, holding that notwithstanding the prior dissolution of the trust and the absence of any § 507(c) liability whatever, the distribution qualified as a § 4945 taxable expenditure. 745 F. 2d 955 (1984). Because I seriously question whether the harsh result reached by the Court of Appeals is consistent with either the letter or intent of the relevant provisions of the Code, I would grant the petitions for certiorari.

No. 84–1914. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 759 F. 2d 342.

JUSTICE WHITE, dissenting.

Title 18 U. S. C. § 649(a) makes it a crime for one having "money of the United States" under his or her control to fail to deposit it when required to do so. Petitioner, who was convicted under this statute, argued on appeal that the evidence on certain counts was insufficient because it showed only her failure to deposit checks payable to the United States. The United States Court of Appeals for the Fourth Circuit rejected petitioner's argument that checks are not "money of the United States" for purposes of § 649(a). 759 F. 2d 342 (1985). This holding conflicts with the Tenth Circuit's interpretation of the statute. See *United States* v. *Fernando*, 745 F. 2d 1328 (1984) (strictly construing "money of the United States" to include only currency and not negotiable documents). I would grant certiorari to resolve this conflict between two Courts of Appeals.

No. 84–1978. SPICER *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 20 M. J. 188.

No. 84–2032. GREEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 1205.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

This case presents the question whether, in a prosecution for mail fraud under 18 U. S. C. § 1341, a defendant who makes out an adequately supported defense of good faith is entitled to a separate jury instruction on that issue when the court gives a sufficient instruction on specific intent. Here, the United States Court of Appeals for the Ninth Circuit held that if a specific-intent instruction adequately covers the issue of good faith, that is sufficient to present the defense to the jury, and the defendant is not entitled to a separate good-faith instruction. 745 F. 2d 1205 (1984). Three other Courts of Appeals have reached the same conclusion. *United States* v. *Gambler*, 213 U. S. App. D. C. 278, 281, 662 F. 2d 834, 837 (1981); *United States* v. *Bronston*, 658 F. 2d 920, 930 (CA2 1981), cert. denied, 456 U. S. 915 (1982); *United States* v. *Sherer*, 653 F. 2d 334, 337–338 (CA8), cert. denied, 454 U. S. 1034 (1981). Both the Fifth Circuit in *United States* v. *Fowler*, 735 F. 2d 823, 828 (1984), and the Tenth Circuit in *United States* v. *Hopkins*, 744 F. 2d 716, 718 (1984) (en banc), however, have reached the opposite conclusion. Both of these courts have held that when the defendant presents evidentiary support for his good-faith defense, the trial court must give a separate instruction to the jury on this issue. See also *United States* v. *McGuire*, 744 F. 2d 1197, 1201 (CA6 1984). Given this square conflict among the Courts of Appeals, I would grant certiorari in this case.

No. 84–6780. SMITH *v.* FRANCIS, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 253 Ga. 782, 325 S. E. 2d 362.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

I would vacate the judgment of the Georgia Supreme Court insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). The petitioner has presented an important question concerning the Eighth Amendment's ban on cruel and unusual punishment as applied to the execution of a mentally retarded person.

I

The petitioner is mentally retarded, with an IQ of 65 and mental abilities roughly equivalent to those of a 10-year-old child. He was tried for the murder of one Dan Turner, a friend of the petitioner and his family. There were no eyewitnesses to the crime. The petitioner had gone into Turner's grocery store to buy some cigarettes. The petitioner testified at trial that he grabbed Turner when the latter opened the cash register. Turner reacted by picking up a hammer, and the petitioner then stabbed him and hit him with the hammer after it fell from the victim's hand. The petitioner took money from the cash register and Turner's wallet and fled.

The petitioner turned himself in to the police and gave a lengthy statement in which he admitted stabbing Turner. When asked about the reasons for his actions, the petitioner stated that he had wanted to get money. At trial, however, the petitioner stated that he had not entered the store intending to rob Turner, and did not know why he had grabbed Turner as the latter was getting the petitioner's cigarettes.

A psychiatrist who examined the petitioner stated that the petitioner showed considerable remorse in discussing the murder. The petitioner testified at trial that he "didn't mean to kill Mr. Dan," but had gotten "carried away" after he saw the victim wielding the hammer in what the petitioner interpreted as a threatening manner. There was evidence that the petitioner was under considerable stress in the days preceding the murder. The petitioner's counsel argued that the petitioner was insane or, at minimum, lacked the requisite mental intent because of his retardation. Nevertheless, the jury found the petitioner guilty of malice murder and armed robbery and sentenced him to death.

II

In *Furman* v. *Georgia*, 408 U. S. 238, 363–369 (1972) (MARSHALL, J., concurring), I concluded that the death penalty was "morally reprehensible" to contemporary society based, in part, on its discriminatory imposition. Statistically, it was "evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society." *Id.*, at 365–366 (footnote omitted). The petitioner suffers the unfortunate distinction of meeting each of these criteria. His case, like so many others coming before this Court, convinces me of the continuing validity of my observations in *Furman*.

I need not recount here our country's shameful history with respect to the mentally retarded. See *Cleburne* v. *Cleburne Living Center*, 473 U. S. 432, 455 (1985) (MARSHALL, J., concurring in judgment in part and dissenting in part). I believe, however, that the courts bear a special responsibility when faced with the possible execution of a member of a group that has been subject for so long to irrational social stigma.[1] This is particularly true in the instant case, because the petitioner's handicap necessarily diminishes his culpability. A mentally retarded person who is susceptible to confusion and impulsive reaction when put in a stressful situation[2] is the very opposite of the cold-blooded, calculating killers that populate this Court's opinions validating the death penalty. See, *e. g.*, *Gregg* v. *Georgia*, *supra*, at 185–186 (opinion of Stewart, POWELL, and STEVENS, JJ.).

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[1] It cannot be denied that American communities have traditionally shown a strong desire to be rid of the mentally retarded in any way possible. See *Cleburne*, 473 U. S., at 462 (retarded subjected during end of 19th and beginning of 20th centuries to a "regime of state-mandated segregation and degradation . . . that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow"). See also *Buck* v. *Bell*, 274 U. S. 200, 207 (1927) (upholding compulsory sterilization as alternative to "waiting to execute degenerate offspring for crime"); *Halderman* v. *Pennhurst State School & Hospital*, 446 F. Supp. 1295, 1299–1300 (ED Pa. 1977) (noting history of institutionalization of mentally retarded), aff'd in part and rev'd in part, 612 F. 2d 84 (CA3 1979), rev'd, 451 U. S. 1 (1981).

[2] A psychiatrist who examined the petitioner testified that he exhibits these characteristics. See Affidavit of Dr. Fisher, App. H to Pet. for Cert. The characteristics are typically found in the mentally retarded. See M. Sternlicht & M. Deutsch, Personality Development and Social Behavior in the Mentally Retarded 81–82 (1972).

This Court has demanded that a capital sentencing scheme provide, at a minimum, a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not," *Furman*, *supra*, at 313 (WHITE, J., concurring); see *Godfrey* v. *Georgia*, 446 U. S. 420, 427–428 (1980) (plurality opinion). In this case, the mechanical application of the Georgia sentencing scheme undermined one purpose that the Court has determined to underlie such procedures—to reserve the penalty of death for the most culpable killers, thus satisfying society's "'instinct for retribution,'" *Gregg* v. *Georgia*, *supra*, at 183 (quoting *Furman*, *supra*, at 308 (Stewart, J., concurring)).[3] The execution of a

[3] Courts have often shown reluctance to impute to a retarded defendant the necessary culpability to uphold a sentence of death. See, *e. g.*, *State* v. *Hall*, 176 Neb. 295, 309–310, 125 N. W. 2d 918, 926–927 (1964) (exercising its statutory prerogative to "'reduce the sentence rendered . . . when in its opinion the sentence is excessive,'" court concluded that where the defendant, had an IQ of 64, "reduction of the death penalty to one of life imprisonment is warranted"); *State* v. *Behler*, 65 Idaho 464, 474–475, 146 P. 2d 338, 343 (1944) ("Undoubtedly, one possessing a normal mind should be held to a full, strict accountability for his conduct, but, should a person with a pronounced subnormal mind be held to the same high degree of accountability?"); *Commonwealth* v. *Green*, 396 Pa. 137, 151 A. 2d 241 (1959) (vacating death sentence where sentencer had failed to consider mitigating factors, including defendant's youth and subnormal intelligence). See also *Thompson* v. *State*, 456 So. 2d 444, 448 (Fla. 1984) (trial judge erred in overriding jury recommendation of life imprisonment on the grounds that no mitigating circumstances existed, where "appellant's mental retardation could have been considered by the jury as a basis for recommending life imprisonment"). Legislatures have also acknowledged that the retarded are less deserving of the death penalty than other offenders. Many state statutes make mental disease or defect at the time of the criminal act a mitigating factor. See Ark. Stat. Ann. § 41–1304(3) (1977); Cal. Penal Code Ann. § 190.3(h) (West Supp. 1985); Conn. Gen. Stat. § 53a–46a(f)(2) (1985); Ind. Code § 35–50–2–9(c)(6) (1985); Ky. Rev. Stat. § 532.025(2)(b)(7) (1985); La. Code Crim. Proc. Ann., Art. 905.5(e) (West 1984); Md. Ann. Code, Art. 27, § 413(g)(4) (Supp. 1985); Neb. Rev. Stat. § 29–2523(2)(g) (1979); N. J. Stat. Ann. § 2C:11–3(c)(5)(d) (West 1982); Ohio Rev. Code Ann. § 2929.04(B)(3) (1982); Tenn. Code Ann. § 39–2–203(j)(8) (1982); Wash. Rev. Code § 10.95.070(6) (1983). See also Ala. Code § 13A–5–51(6) (1982); Ariz. Rev. Stat. Ann. § 13–703(G)(1) (Supp. 1984–1985); Fla. Stat. § 921.141(6)(f) (1983); Miss. Code Ann. § 99–19–101(6)(f) (Supp. 1985); Mo. Rev. Stat. § 565.032(3)(6) (Supp. 1984); Mont. Code Ann. § 46–18–304(4) (1983); N. H. Rev. Stat. Ann. § 630:5(II)(b)(4) (1983); N. M. Stat. Ann. § 31–20A–6(C) (1981); N. C. Gen. Stat. § 15A–2000(f)(6) (1983); 42 Pa. Cons. Stat. § 9711(e)(3) (1982); S. C. Code § 16–3–20(C)(b)(6) (1985); Va. Code § 19.2–264.4(B)(iv) (1983); Wyo. Stat. § 6–2–102(j)(vi) (1983).

mentally retarded person serves this retributive function extremely poorly, because the level of "personal responsibility and moral guilt," *Enmund* v. *Florida*, 458 U. S. 782, 801 (1982), is so much lower than in the case of a fully competent person who commits the same crime.[4] As applied to the petitioner, the death penalty is "nothing more than the purposeless and needless imposition of pain and suffering," *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion), and therefore unconstitutional.

No. 84-6792. KERR *v.* FINKBEINER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 757 F. 2d 604.

JUSTICE WHITE, with whom JUSTICE MARSHALL joins, dissenting.

In April 1979, fugitive warrants were issued against petitioner Kerr by the Circuit Court of Spotsylvania County, Virginia. At that time, Kerr was incarcerated in North Carolina. On May 21, 1979, Kerr filed a "Motion and Request for a Speedy Trial Upon Pending Charge or for Dismissal of Detainer" in the Spotsylvania County Circuit Court. Receipt of the motion was acknowledged by that court on May 23, 1979. On September 25, 1979, Kerr was transported to Virginia from North Carolina. A preliminary hearing was set for November 7, 1979, but the hearing was rescheduled for November 28, 1979, at the request of Kerr's attorney. On the latter date, Kerr waived his right to a preliminary hearing and consented to the State's proceeding by grand jury indictment. The Spotsylvania County grand jury indicted Kerr on January 21, 1980, and his trial was set for May 22, 1980.

On May 19, 1980, Kerr moved to dismiss the indictment. He based this motion on Article III(a) of the Interstate Agreement on Detainers (IAD), which provides that a prisoner against whom a detainer has been lodged "shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court . . . written notice of . . . his request for a final disposition to be made of the indictment, information, or complaint . . . ," as set forth in 18 U. S. C. App. § 2. Article V(c) of the IAD further provides that

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[4] Recognizing the greatly lower culpability of the mentally defective is certainly not novel; Blackstone notes that "by the law . . . ever since the time of Edward the Third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment." 4 W. Blackstone, Commentaries *23.

> "in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III . . . hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice . . . ."

Kerr's motion was denied, and he was tried and found guilty as charged. His petition to the Supreme Court of Virginia for a writ of error was denied.

Kerr then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia. He asserted in that petition that he was entitled to relief because he had not been tried within the time limits prescribed by Article III(a) of the IAD. The District Court dismissed the complaint on the ground that it did not state a claim for relief under 28 U. S. C. § 2254.

The United States Court of Appeals for the Fourth Circuit affirmed the dismissal of Kerr's habeas corpus petition. 757 F. 2d 604 (1985). The Fourth Circuit cited *Davis* v. *United States*, 417 U. S. 333 (1974), as setting forth the inquiry for determining whether habeas relief is warranted: "'whether the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent."'" 757 F. 2d, at 606 (quoting *Davis*, *supra*, at 346 (in turn quoting *Hill* v. *United States*, 368 U. S. 424, 428 (1962))). The court then noted that in a similar case concerning Article IV(e) of the IAD (under which a prisoner must be tried before being returned to his original place of incarceration and to which the same Article V sanction applies), a previous panel of the Circuit had held that the IAD violation did not present a cognizable habeas claim under the *Davis* test. See *Bush* v. *Muncy*, 659 F. 2d 402 (CA4 1981). In that case, the court had concluded that "only those statutory rights of a fundamental nature closely related to constitutionally secured rights to fair prosecution and adjudication should be subject to vindication by collateral review of criminal convictions." *Id.*, at 409.

The Court of Appeals also noted in this case that the Circuits are divided on the question whether Articles III and IV IAD viola-

tions present cognizable habeas claims under *Davis*. The Third and Ninth Circuits have held that they do. The Third Circuit, for example, has held that such a violation constitutes a "fundamental defect" because, although it does not go to the question of guilt or innocence, Congress made such a violation an absolute defense to prosecution; this strong congressional policy comprises the type of "exceptional circumstance" that makes habeas relief appropriate. See *United States* v. *Williams*, 615 F. 2d 585, 590 (1980). See also *Cody* v. *Morris*, 623 F. 2d 101 (CA9 1980).

All the other Circuits that have addressed the issue have determined that habeas relief is not appropriate in this context, although it may be if prejudice or special circumstances are shown. See, *e. g.*, *Greathouse* v. *United States*, 655 F. 2d 1032 (CA10 1981), cert. denied, 455 U. S. 926 (1982); *Mars* v. *United States*, 615 F. 2d 704 (CA6), cert. denied, 449 U. S. 849 (1980); *Fasano* v. *Hall*, 615 F. 2d 555 (CA1), cert. denied, 449 U. S. 867 (1980); *Huff* v. *United States*, 599 F. 2d 860 (CA8), cert. denied, 444 U. S. 952 (1979); *Edwards* v. *United States*, 564 F. 2d 652 (CA2 1977). The Court of Appeals below followed the latter group of cases and held that since Kerr had introduced no evidence of prejudice, his petition had properly been dismissed.

The conflict among the Circuits on this issue is clear. In some Circuits an IAD violation that constitutes an absolute defense under the Agreement can, without more, serve as the basis for habeas relief. In others, prejudice must be shown. Furthermore, it is obvious that the issue is a recurring one. I would grant the petition to settle this conflict.

No. 85–59. NORTH SIDE LUMBER CO. ET AL. *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1482.

JUSTICE WHITE, dissenting.

This is a suit brought in Federal District Court by various lumber companies who had contracted to purchase timber from the United States. The plaintiffs—petitioners here—seek both a declaratory judgment to the effect that the contracts are void as a matter of federal common law and an injunction restraining the United States from enforcing them. The District Court granted preliminary injunctive relief, but the Court of Appeals for the Ninth Circuit reversed, holding that the District Court lacked jurisdiction over petitioners' underlying claim for declaratory

relief. Although conceding that such a suit arose under federal law for purposes of 28 U. S. C. § 1331, the court concluded that the Tucker Act, 28 U. S. C. §§ 1346 and 1491, impliedly barred the relief sought. The court reasoned that the Tucker Act, under which declaratory relief is not available, see *Richardson* v. *Morris*, 409 U. S. 464 (1973), defined the extent of the United States' waiver of sovereign immunity against the types of claims for which the Tucker Act authorizes monetary relief.[1] Because, in the view of the Court of Appeals, the suit to void the contracts was a "claim against the United States . . . founded . . . upon [an] express or implied contract," 28 U. S. C. § 1346(a)(2), the relief available was governed by the Tucker Act, and declaratory relief was therefore unavailable.

My doubts about the correctness of this ruling and its consistency with the decision of another Court of Appeals lead me to believe that review of the Ninth Circuit's conclusion in this Court is warranted. Even accepting the Court of Appeals' view that the Tucker Act impliedly bars declaratory and injunctive relief in all cases in which assertion of a claim of damages would require invocation of the Tucker Act,[2] the Court of Appeals' conclusion that

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[1] The court concluded that the United States' general waiver of sovereign immunity against suits seeking relief other than money damages, 5 U. S. C. § 702, was inapplicable by virtue of its proviso, which states that "[n]othing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The court concluded that the Tucker Act impliedly denied consent to suit for nonmonetary relief with respect to all cases involving claims of the type for which the Act authorizes damages actions.

[2] The Tucker Act also applies to claims for damages "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department." 28 U. S. C. §§ 1346(a)(2) and 1491(a). Thus, the Ninth Circuit's reasoning, if taken literally, would also bar a suit for injunctive or declaratory relief against officers of the United States Government founded upon the Constitution, a federal statute, or a federal regulation, even if the claim for declaratory or injunctive relief was not accompanied by a claim for damages. Title 5 U. S. C. § 702, the provision of the Administrative Procedure Act waiving the United States' sovereign immunity against claims other than claims for money damages, would thus be rendered a dead letter. As the Second Circuit has observed, "[a] literal reading of the 'founded either upon' language of § 1491(a) would mean that all claims of wrongful action by federal officials involving more than $10,000 would have to be brought in the Claims Court—a result clearly in conflict with historic practice and with the

petitioners' suit was a "claim against the United States . . . founded . . . upon [a] . . . contract" is highly questionable. In fact, the claim is precisely the opposite of a claim founded upon a contract: it is a claim that no contract exists. At least one United States Court of Appeals has ruled the suits seeking declaratory judgments to the effect that valid contracts *exist* are not claims founded upon a contract for purposes of the Tucker Act. See *B. K. Instrument, Inc.* v. *United States*, 715 F. 2d 713, 726–728 (CA2 1983). If *B. K. Instrument* was correctly decided, it would follow *a fortiori* that a federal common-law claim that a contract does *not* exist is not "founded upon a contract."

The Ninth Circuit's conclusion that a district court lacks jurisdiction to issue a declaratory judgment that a contract between a private party and the United States is void is problematic from another standpoint as well. Had petitioners breached their contracts rather than first seeking a declaratory judgment, the District Court would have had jurisdiction under 28 U. S. C. § 1345 over an action for breach of contract brought by the United States as plaintiff. In such an action, petitioners could have raised as a defense their claim that the contracts were void as a matter of federal common law; and surely no one would argue that, were the defense valid, the District Court would lack *jurisdiction* to declare the contracts void. Why, then, should similar relief be barred in a claim brought in anticipation of the breach? In both cases, the claim is in essence a defense to the Government's contractually based claim; and if petitioners' declaratory judgment action meets ordinary standards of ripeness and arises under federal law for purposes of 28 U. S. C. § 1331, I see no reason to hold that the relief that would be available to petitioners as defendants should be denied them as plaintiffs. In such instances, "[i]t is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative." *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 244 (1937). Cf. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667 (1950).[3] The

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plain intent of Congress . . . ." *B. K. Instrument, Inc.* v. *United States*, 715 F. 2d 713, 727 (1983).

[3] In *Skelly Oil*, the Court observed:

"Prior to [the Declaratory Judgment] Act, a federal court would entertain a suit on a contract only if the plaintiff asked for an immediately enforceable remedy like money damages or an injunction, but such relief could only be given if the requisites of jurisdiction, in the sense of a federal right or diver-

contrary rule, as announced by the Ninth Circuit in this case, leaves a person who has contracted with the Government but who believes the contract to be void no choice but to breach the contract and assert his claim as a defense, thereby risking liability for damages. I had thought this was precisely the situation the Declaratory Judgment Act was designed to remedy.[4]

Concededly, this case does not at first glance appear to be one of great moment, and I certainly do not mean to express any view of the merits of petitioners' underlying substantive claims. Nonetheless, the Ninth Circuit's expansive reading of the Tucker Act as precluding a declaratory judgment as to the validity of a contract with the United States appears to be in tension with the law of the Second Circuit as well as with ordinary principles governing declaratory actions. I would grant certiorari to consider and resolve the jurisdictional issues this case presents.

No. 85–151. MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* MUNIZ. C. A. 5th Cir. Motion of respondent

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sity, provided foundation for resort to the federal courts. The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked." 339 U. S., at 671–672.

Of course, the specific holding in *Skelly* was that a declaratory judgment as to the validity of a contract was unavailable where the only basis for federal subject-matter jurisdiction was a federal-law defense to a state-law contract claim. This problem is not present here, as federal jurisdiction is not predicated solely on petitioners' asserted federal-law defense to the contract action. First, the "coercive action" that would be available for resolution of the issues presented—that is, the Government's claim for breach of contract—would be within the District Court's jurisdiction by virtue of 28 U. S. C. § 1345. Second, the coercive action for breach of contract in this case would also arise under federal law for purposes of 28 U. S. C. § 1331, for "[t]he validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State." *United States* v. *County of Allegheny*, 322 U. S. 174, 183 (1944). See also *United States* v. *Seckinger*, 397 U. S. 203, 209–210 (1970); *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943).

[4] I do not mean to suggest that the Declaratory Judgment Act, 28 U. S. C. § 2201, itself constitutes consent to suit by the United States. I refer to the policies of the Act only insofar as they bear on the wisdom of construing the Tucker Act to render inoperative in cases of this type the waiver of sovereign immunity found at 5 U. S. C. § 702.

for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 760 F. 2d 588.

No. 85–421. PRUDENTIAL-BACHE SECURITIES INC. *v.* ANGELASTRO. C. A. 3d Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 764 F. 2d 939.

No. 85–5164. COLLINS ET AL. *v.* ILLINOIS. Sup. Ct. Ill.;
No. 85–5180. MADEJ *v.* ILLINOIS. Sup. Ct. Ill.;
No. 85–5291. COOKS *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 85–5308. THOMAS *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir.;
No. 85–5310. BAXTER *v.* GEORGIA. Sup. Ct. Ga.; and
No. 85–5477. HARRELL *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: No. 85–5164, 106 Ill. 2d 237, 478 N. E. 2d 267; No. 85–5180, 106 Ill. 2d 201, 478 N. E. 2d 392; No. 85–5291, 699 P. 2d 653; No. 85–5308, 767 F. 2d 916; No. 85–5310, 254 Ga. 538, 331 S. E. 2d 561; No. 85–5477, 470 So. 2d 1303.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 84–1597. MANN *v.* SPIEGEL, 471 U. S. 1136. Petition for rehearing denied.

OCTOBER 22, 1985

Dismissal Under Rule 53

No. 85–5447. TOWLES *v.* UNITED STATES. Ct. App. D. C. Certiorari dismissed under this Court's Rule 53. Reported below: 496 A. 2d 560.

NOVEMBER 4, 1985

Appeals Dismissed

No. 85–244. ADVENTURERS WHITESTONE CORP. *v.* CITY OF NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of

substantial federal question. Reported below: 65 N. Y. 2d 83, 479 N. E. 2d 241.

No. 85–422. COLONIAL PIPELINE CO. *v.* ALABAMA. Appeal from Ct. Civ. App. Ala. dismissed for want of substantial federal question. Reported below: 471 So. 2d 408.

No. 85–5387. NELSON *v.* PLEASANT GROVE CITY CORP. Appeal from Sup. Ct. Utah dismissed for want of substantial federal question.

No. 85–367. HUSKEY *v.* TENNESSEE. Appeal from Sup. Ct. Tenn. dismissed for want of jurisdiction. Reported below: 688 S. W. 2d 417.

No. 85–380. CAMDEN FIRE INSURANCE ASSN. *v.* JUSTICE. Appeal from Sup. Ct. App. W. Va. Motion of appellee for award of costs and damages for delay denied. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: —— W. Va. ——, 332 S. E. 2d 127.

No. 85–415. PERRUZZA *v.* COUNTY OF LOS ANGELES ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 765 F. 2d 149.

No. 85–534. WILMSHURST ET AL. *v.* NEW MOTOR VEHICLE BOARD ET AL. Appeal from Ct. App. Cal., 3d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Reversed and Remanded. (See No. 85–214, *ante*, p. 15.)

Certiorari Granted—Vacated and Remanded. (See No. 85–5260, *ante*, p. 25.)

Certiorari Granted—Reversed. (See also Nos. 84–1634 and 85–170, *ante*, p. 3.)

No. 85–295. COUNTY OF LOS ANGELES ET AL. *v.* KLING. C. A. 9th Cir. Certiorari granted and judgment reversed. *Anderson* v. *Bessemer City*, 470 U. S. 564 (1985). Reported below: 769 F. 2d 532.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 42, 51–52 (1982) (MARSHALL, J., dissenting).

JUSTICE STEVENS, dissenting.

Respondent is afflicted with Crohn's disease. Although originally accepted, her application for admission to the Los Angeles County School of Nursing was ultimately denied, at least in part, because of the school physician's opinion that the school program was "too stressful" for her. Finding of Fact No. 12, App. to Pet. for Cert. D–40. Nevertheless, the District Court concluded that respondent had "failed to show that she was denied admission to the School solely by reason of her affliction or because she had Crohn's disease." Finding of Fact No. 18, App. to Pet. for Cert. D–43. Based on this critical finding, the District Court denied respondent any relief under § 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794.

The Court of Appeals for the Ninth Circuit reversed. After reviewing the prior history of the case and explaining why it had previously reversed the District Court's order denying respondent's motion for a preliminary injunction, the Court of Appeals wrote:

> "The trial in the district court did not produce substantially different evidence from that which we considered in *Kling I*. The district court's findings are clearly erroneous and in many instances are inconsistent. We find that Mary Kling is an 'otherwise qualified handicapped individual' within the meaning of section 504 of the Rehabilitation Act[1] and that she was denied admission to the School of Nursing solely because of her handicap.[2] The school's physician, Dr. Crary, rejected Kling because she suffers from Crohn's Disease. He assumed that merely because of her disease she would be unable to complete the school's program. He did not evaluate her on an individual basis and even testified that had he known more about Kling's medical history, he would have been 'swayed very strongly toward acceptance.' It is precisely this type of general assumption about a handicapped person's ability that section 504 was designed to avoid. *See*

Bentivegna v. *United States Department of Labor*, 694 F. 2d 619 (9th Cir. 1982); *Pushkin* v. *Board of Regents of the University of Colorado*, 658 F. 2d 1372, 1385 (10th Cir. 1981). This district court's legal conclusions are similarly erroneous.

"[1] 29 U. S. C. § 794. *See* 34 CFR § 104.3(j).

"[2] The School of Nursing's claim that Kling was not otherwise qualified because she failed to meet the mathematical entrance requirement is meritless. Because Kling was rejected solely because of her handicap and because this decision was made without regard to her mathematical deficiency and before she had an opportunity to submit evidence that she had or had not remedied the deficiency, it is irrelevant that the deficiency may have existed."

App. to Pet. for Cert. A–6—A–7, and nn. 1, 2.

As this Court's summary disposition today demonstrates, the Court of Appeals would have been well advised to discuss the record in greater depth. One reason it failed to do so is that the members of the panel decided that the issues presented by this case did not warrant discussion in a published opinion that could be "cited to or by the courts of this circuit, save as provided by Rule 21(c)." *Id.*, at A–2, n. **. That decision not to publish the opinion or permit it to be cited—like the decision to promulgate a rule spawning a body of secret law—was plainly wrong.[1]

The brevity of analysis in the Court of Appeals' unpublished, noncitable opinion, however, does not justify the Court's summary reversal.[2] Presumably, the Court's reversal is not based on

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[1] The proliferation of this secret law has prompted extensive comment. See, *e. g.*, R. Posner, The Federal Courts 120–126 (1985); Wald, The Problem with the Courts: Black-robed Bureaucracy, or Collegiality Under Challenge?, 42 Md. L. Rev. 766, 781–783 (1983); Reynolds & Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U. Chi. L. Rev. 573 (1981); Reynolds & Richman, The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 Colum. L. Rev. 1167 (1978); Stevens, Address to the Illinois State Bar Association's Centennial Dinner, 65 Ill. Bar J. 508, 510 (1977). Cf. Grodin, The Depublication Practice of the California Supreme Court, 72 Calif. L. Rev. 514 (1984).

[2] The petition for certiorari submitted the Ninth Circuit's opinion as it was issued, with the footnote explaining that the opinion could not be published or cited. Two days after the petition for certiorari was filed, the Ninth Circuit panel issued an order, as part of the publication of the slip opinion, that "redesignated" the earlier decision as "an authored opinion." See *Kling* v. *County of Los Angeles*, No. 83–6193, Order and Opinion (Aug. 23, 1985). The opinion is now published. See 769 F. 2d 532 (1985).

a view that the Court of Appeals misapprehended the governing standard: as the Ninth Circuit stated, findings of fact by the District Court are reviewable to determine if they are "clearly erroneous." Fed. Rule Civ. Proc. 52(a). Apparently, the Court disagrees with the Ninth Circuit's application of that standard. However, the Court's reversal is not accompanied by a review of the District Court's factual findings or a determination that they are not, in fact, "clearly erroneous." The Court is thus spared the necessity of explaining the apparent inconsistencies in the District Court's findings.[3] The Court is also spared the necessity of addressing the fact that petitioners' own rendition of the incidents in question suggests that the District Court's findings give a less than complete accounting of certain events—events that may well influence a court's view of the matter at hand.[4]

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[3] Compare Finding of Fact No. 16, App. to Pet. for Cert. D–42 ("Plaintiff has failed to show that she is a person who has a physical or mental impairment which substantially limits one or more of her major life activities, or has a record of such impairment or is regarded as having such an impairment") with Finding of Fact No. 4, App. to Pet. for Cert. D–36 ("Plaintiff at all times herein mentioned suffered from Crohn's disease, an inflamatory *[sic]* bowel disorder involving the digestive tract which prevents passage and absorption of food and causes in plaintiff unpredictable episodes of nausea, vomiting, fever, headaches, loss of weight and acute abdominal pain among other things and which can require rest, medication, treatment, and hospitalization") and Finding of Fact No. 10, App. to Pet. for Cert. D–39 ("The record reflected that in the ten months preceding Dr. Crary's review, plaintiff had been hospitalized four times for Crohn's disease, although plaintiff only reported three hospitalizations").

Compare also Finding of Fact No. 12, App. to Pet. for Cert. D–40—D–41 (Dr. Crary's "rejection of plaintiff as a candidate for the School on June 11, 1979 was for health reasons, because he believed it was unlikely she could complete the rigorous program and because he believed her health would be endangered if she attempted to complete the program") and Finding of Fact No. 13, App. to Pet. for Cert. D–41 ("Neither the Admissions Committee nor Mary Duncan, Registrar, had the authority to overrule Dr. Crary's medical decision") with Finding of Fact No. 18, App. to Pet. for Cert. D–43 ("Plaintiff has failed to show that she was denied admission to the School solely by reason of her affliction or because she had Crohn's disease").

[4] Compare Finding of Fact No. 7, App. to Pet. for Cert. D–37 ("Plaintiff's application was considered by the Admissions Committee of the School on April 5, 1979. Her acceptance academically by the School was conditional due to her failure to achieve a passing score in mathematics") with Pet. for Cert. 4–5 ("In April, 1979, by mistake, respondent was given a letter unconditionally accepting her application, even though her score on a mathematics

Finally, the Court is spared the necessity of analyzing the District Court's factual findings in the context of the record. The absence of such an analysis is somewhat puzzling. The entirety of the majority's analysis is a reference to *Anderson* v. *Bessemer City*, 470 U. S. 564 (1985). In that case, the Court found it necessary to review the record before it reversed the Court of Appeals' conclusion that the District Court's findings were clearly erroneous. *Id.*, at 576–581. The Court's refusal to undertake such a review for its summary disposition in the case before us is especially disturbing when it is recalled that, under current Court practice, the petitioner does not usually file the record with a petition for certiorari.[5]

In my judgment, this Court does not use its scarce resources wisely when it undertakes to engage in the *de novo* review of factual records in relatively routine litigation. Cf. *United States* v. *Hasting*, 461 U. S. 499, 516–518 (1983) (STEVENS, J., concurring in judgment). When such review is necessary to a disposition, however, and the Court fails to provide it, the problems of this Court's review are still more troubling. For, like a court of appeals that issues an opinion that may not be printed or cited, this Court then engages in decisionmaking without the discipline and accountability that the preparation of opinions requires.[6]

I respectfully dissent from the Court's summary reversal.

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portion of the entrance examination was deficient, and even though she had not been cleared for admission by the School's Student Health Physician, Gerald C. Crary, M. D. . . . In an interview on April 20, 1979, the School's Registrar, Mary J. Duncan, told respondent that her acceptance was actually conditional on her presenting evidence of tutoring and testing to establish the requisite thirteenth-grade level of proficiency in mathematics concepts and problems, and on her passing the physical requirements").

[5] See this Court's Rule 21; Stevens, The Life Span of a Judge-Made Rule, 58 N. Y. U. L. Rev. 1, 13 (1983); R. Stern & E. Gressman, Supreme Court Practice 424–429 (5th ed. 1978).

[6] "In our law the opinion has in addition a central forward-looking function which reaches far beyond the cause in hand: the opinion has as one if not its major office to show how like cases are properly to be decided in the future. This also frequently casts its shadow before, and affects the deciding of the cause in hand. (If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good.) Thus the opinion serves as a steadying factor which aids reckonability."

K. Llewellyn, The Common Law Tradition 26 (1960), quoted in Reynolds & Richman, *supra* n. 1, at 1204.

JUSTICE BRENNAN dissents from the Court's summary reversal substantially for the reasons stated by JUSTICE STEVENS.

Certiorari Granted in Part—Reversed. (See No. 85–130, *ante*, p. 9.)

Miscellaneous Orders

No. — — ——. JURECZKI *v.* CITY OF SEABROOK, TEXAS, ET AL. Motion to direct the Clerk to file the petition for writ of certiorari which does not comply with the Rules of this Court denied.

No. A–223. DODSON *v.* COOPER, SUPERINTENDENT, SHADOW MOUNTAIN CORRECTIONAL FACILITY. Sup. Ct. Colo. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–251. JENNINGS *v.* JENNINGS. Sup. Ct. Iowa. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. D–528. IN RE DISBARMENT OF LARKIN. It is ordered that Tom L. Larkin, of Birmingham, Ala., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–529. IN RE DISBARMENT OF MENDELL. It is ordered that Stephen W. Mendell, of St. Joseph, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–530. IN RE DISBARMENT OF SIEGFRIED. It is ordered that Scott Thomas Siegfried, of Wadsworth, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 103, Orig. SOUTH DAKOTA *v.* NEBRASKA ET AL. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 83–2004. MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL. *v.* ZENITH RADIO CORP. ET AL. C. A. 3d Cir. [Certiorari granted, 471 U. S. 1002.] Motion of the Solicitor General to

permit Charles F. Rule, Esquire, to present oral argument *pro hac vice* granted.

No. 84–773. BENDER ET AL. *v.* WILLIAMSPORT AREA SCHOOL DISTRICT ET AL. C. A. 3d Cir. [Certiorari granted, 469 U. S. 1206.] Motion of petitioners for leave to file a supplemental brief after argument granted.

No. 84–1362. PUBLIC SERVICE COMMISSION OF MARYLAND *v.* CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF MARYLAND. C. A. 4th Cir. [Certiorari granted, 472 U. S. 1026.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 84–1484. WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS ET AL. *v.* GOULD INC. C. A. 7th Cir. [Probable jurisdiction noted, 471 U. S. 1115.] Motion of Chamber of Commerce of the United States of America for leave to file a brief as *amicus curiae* granted.

No. 84–1531. MICHIGAN *v.* JACKSON; and

No. 84–1539. MICHIGAN *v.* BLADEL. Sup. Ct. Mich. [Certiorari granted, 471 U. S. 1124.] Motion of petitioner to reconsider order denying motion for divided argument [*ante*, p. 810] denied.

No. 84–1948. BLOCK, SECRETARY OF AGRICULTURE, ET AL. *v.* PAYNE ET AL. C. A. 11th Cir. [Certiorari granted, *ante*, p. 815.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 84–6263. BATSON *v.* KENTUCKY. Sup. Ct. Ky. [Certiorari granted, 471 U. S. 1052.] Motion of Elizabeth Holtzman, District Attorney for Kings County, New York, for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 84–6859. SKIPPER *v.* SOUTH CAROLINA. Sup. Ct. S. C. [Certiorari granted, *ante*, p. 900.] Motion for appointment of counsel granted, and it is ordered that David I. Bruck, Esquire, of Columbia, S. C., be appointed to serve as counsel for petitioner in this case.

No. 85–129. WIMBERLY *v.* LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI ET AL. Sup. Ct. Mo.; and

No. 85–279. AMERICAN PETROFINA COMPANY OF TEXAS *v.* OIL CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION LOCAL NO. 4–23 ET AL. C. A. 5th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 85–188. KEMP, WARDEN *v.* BLAKE. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 85–5023. POLAND *v.* ARIZONA; and
No. 85–5024. POLAND *v.* ARIZONA. Sup. Ct. Ariz. [Certiorari granted, *ante*, p. 816.] Motions for appointment of counsel granted, and it is ordered that H. K. Wilhelmsen, Esquire, of Prescott, Ariz., be appointed to serve as counsel for petitioners in these cases.

No. 85–5401. IN RE DAY. Sup. Ct. Tex. Petition for writ of common-law certiorari denied.

No. 85–5381. IN RE PALLETT;
No. 85–5414. IN RE MEADOWS;
No. 85–5430. IN RE PARRISH; and
No. 85–5441. IN RE JOKINEN. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 84–902. WARDAIR CANADA INC. *v.* FLORIDA DEPARTMENT OF REVENUE. Appeal from Sup. Ct. Fla. Probable jurisdiction noted. Reported below: 455 So. 2d 326.

No. 84–1904. UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS *v.* GALIOTO. Appeal from D. C. N. J. Probable jurisdiction noted. Reported below: 602 F. Supp. 682.

No. 85–62. MAINE *v.* TAYLOR ET AL. Appeal from C. A. 1st Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 752 F. 2d 757.

Certiorari Granted

No. 85–140. BOWERS, ATTORNEY GENERAL OF GEORGIA *v.* HARDWICK ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 760 F. 2d 1202.

No. 85–198. CELOTEX CORP. *v.* CATRETT, ADMINISTRATRIX OF THE ESTATE OF CATRETT. C. A. D. C. Cir. Certiorari granted. Reported below: 244 U. S. App. D. C. 160, 756 F. 2d 181.

No. 85–227. SMALIS ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari granted. Reported below: 507 Pa. 344, 490 A. 2d 394.

No. 85–385. BROCK, SECRETARY OF LABOR *v.* PIERCE COUNTY. C. A. 9th Cir. Certiorari granted. Reported below: 759 F. 2d 1398.

No. 85–5189. MCLAUGHLIN *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted.

Certiorari Denied. (See also Nos. 85–380, 85–415, 85–534, and 85–5401, *supra.*)

No. 84–1645. WEISS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 752 F. 2d 777.

No. 84–1766. SMITH *v.* THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 760 F. 2d 267.

No. 84–1952. WOOD *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 156.

No. 84–2005. IN RE GROTHE. Ct. Crim. App. Tex. Certiorari denied. Reported below: 687 S. W. 2d 736.

No. 84–6748. WILEY *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 84–6753. CARSON *v.* TURNER ET AL. C. A. 5th Cir. Certiorari denied.

No. 84–6756. LEWIS *v.* PORT AUTHORITY OF NEW YORK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 921.

No. 84–6759. MIDWIFE ET AL. *v.* WOODS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 67.

No. 84–6786. WILSON *v.* REES, SUPERINTENDENT, KENTUCKY STATE REFORMATORY. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1014.

No. 84–6845. MARK, AKA WILLIAMS *v.* CALDWELL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 754 F. 2d 1260.

No. 84–6931. MARTINEZ-VALDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 1204.

No. 84–6932. CHITTY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 760 F. 2d 425.

No. 85–17. VERNON *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 68.

No. 85–43. SENFT ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 991.

No. 85–44. BERGMAN *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 751 F. 2d 314.

No. 85–79. TOLAND *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 285 Ark. 415, 688 S. W. 2d 718.

No. 85–211. DRACOS, ADMINISTRATRIX FOR THE ESTATE OF DRACOS *v.* HELLENIC LINES LTD. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 348.

No. 85–221. JENSEN *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 2d 383.

No. 85–222. BAKER, INDIVIDUALLY AND DBA BAKER COAL CO. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1076.

No. 85–234. UNITED ARTISTS COMMUNICATIONS, INC. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 756 F. 2d 502.

No. 85–263. MAGGETTE *v.* COOK COUNTY POLICE AND CORRECTIONS MERIT BOARD ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 129 Ill. App. 3d 1149, 491 N. E. 2d 1382.

No. 85–273. FLORIDA *v.* ROSS. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 471 So. 2d 196.

No. 85–287. COURT HOUSE PLAZA CO. *v.* CITY OF PALO ALTO ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 85-321. PETERSON *v.* AIR LINE PILOTS ASSN., INTERNATIONAL, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 759 F. 2d 1161.

No. 85-343. PRUDENTIAL FEDERAL SAVINGS & LOAN ASSN. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 763 F. 2d 1166.

No. 85-345. ALLEN *v.* CITY OF KINLOCH, MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 763 F. 2d 335.

No. 85-349. TOMCZAK *v.* CITY OF CHICAGO. C. A. 7th Cir. Certiorari denied. Reported below: 765 F. 2d 633.

No. 85-351. W. A. FOOTE MEMORIAL HOSPITAL, INC. *v.* GRUBB. C. A. 6th Cir. Certiorari denied. Reported below: 759 F. 2d 546.

No. 85-360. WASSERSTROM *v.* EISENBERG ET AL.;
No. 85-407. WEINSTEIN *v.* EISENBERG ET AL.; and
No. 85-514. PELINO, WASSERSTROM, CHUCAS & MONTEVERDE, P. C. *v.* EISENBERG ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 766 F. 2d 770.

No. 85-365. RUSTIN ET AL. *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 491 A. 2d 496.

No. 85-370. HEPLER *v.* COLUMBIA BROADCASTING SYSTEM, INC. Ct. App. Wash. Certiorari denied. Reported below: 39 Wash. App. 838, 696 P. 2d 596.

No. 85-371. GENESIS BROADCASTING LTD. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 245 U. S. App. D. C. 233, 759 F. 2d 959.

No. 85-373. REED ET AL. *v.* TERRELL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 472.

No. 85-374. DENSON *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 162.

No. 85-378. ROBERTS ET AL. *v.* SIMPSON, EXECUTRIX OF THE ESTATE OF BEEL, ET AL. Ct. App. Ark. Certiorari denied. Reported below: 15 Ark. App. xix.

No. 85–381. PATEL *v.* FLYING TIGER LINE, INC. C. A. 9th Cir. Certiorari denied. Reported below: 762 F. 2d 1018.

No. 85–382. HEGGY *v.* WELTY ET UX. Ct. App. Wis. Certiorari denied. Reported below: 124 Wis. 2d 318, 369 N. W. 2d 763.

No. 85–383. JOHNSTON *v.* CITY OF ANN ARBOR ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 920.

No. 85–384. BROWN *v.* FERRO CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 763 F. 2d 798.

No. 85–387. MAINES ET AL. *v.* SECRETARY OF STATE OF MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 493 A. 2d 326.

No. 85–389. CHAPMAN ET AL. *v.* LUNA ET AL. Sup. Ct. N. M. Certiorari denied. Reported below: 102 N. M. 768, 701 P. 2d 367.

No. 85–397. FUDGER *v.* COUNTY OF MONTGOMERY. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 135.

No. 85–399. YOUNG ET AL. *v.* GREAT ATLANTIC & PACIFIC TEA CO. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 263.

No. 85–401. MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* JONES. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 101.

No. 85–403. SCHELLER *v.* AMERICAN MEDICAL INTERNATIONAL, INC., ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 462 So. 2d 1.

No. 85–409. HUNT, BY AND THROUGH HIS FATHER AND NEXT FRIEND, HUNT, ET AL. *v.* GUILFORD COUNTY BOARD OF EDUCATION. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 998.

No. 85–414. AMBROSE *v.* SPERRY RAND CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 760 F. 2d 273.

No. 85–419. GENERAL DRIVERS & HELPERS UNION, LOCAL NO. 554 *v.* MID-CONTINENT BOTTLERS, INC. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 482.

No. 85–424. MEAD, A MINOR, BY MEAD, HIS FATHER AND NEXT FRIEND *v.* UNITED STATES C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 924.

No. 85–435. CITY OF GAINESVILLE, FLORIDA *v.* ISLAND CREEK COAL SALES CO. C. A. 6th Cir. Certiorari denied. Reported below: 764 F. 2d 437.

No. 85–436. FLORIDA STATE UNIVERSITY HEALTH CENTER ET AL. *v.* JOSHI. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 1227.

No. 85–439. CALIFORNIA EX REL. COOPER, CITY ATTORNEY OF SANTA ANA, CALIFORNIA *v.* MITCHELL BROTHERS' SANTA ANA THEATER ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 165 Cal. App. 3d 378, 211 Cal. Rptr. 501.

No. 85–449. ISLAMIC REPUBLIC OF IRAN ET AL. *v.* MCDONNELL DOUGLAS CORP. C. A. 8th Cir. Certiorari denied. Reported below: 758 F. 2d 341.

No. 85–453. SAN ANTONIO INDEPENDENT SCHOOL DISTRICT *v.* CITY OF SAN ANTONIO. Ct. App. Tex., 4th Sup. Jud. Dist. Certiorari denied. Reported below: 683 S. W. 2d 67.

No. 85–454. SIBAJA ET AL. *v.* DOW CHEMICAL CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 1215.

No. 85–464. MEYERS INDUSTRIES, INC. *v.* PRILL ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 244 U. S. App. D. C. 42, 755 F. 2d 941.

No. 85–479. MEDINA *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 760 F. 2d 252.

No. 85–480. STRODE *v.* GREGORY ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 85–491. RAZZANO ET AL. *v.* DUNLOP TIRE & RUBBER CO., INC. C. A. 4th Cir. Certiorari denied. Reported below: 760 F. 2d 265.

No. 85–511. PAK-MOR MANUFACTURING CO. *v.* JONES ET AL. Sup. Ct. Ariz. Certiorari denied. Reported below: 145 Ariz. 121, 700 P. 2d 819.

No. 85–518. PINCKARD ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 749 F. 2d 1477.

No. 85–520. HOLWAY *v.* BURGER, CHIEF JUSTICE OF THE UNITED STATES, ET AL. C. A. 4th Cir. Certiorari denied.

No. 85–543. MORENO *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 471 So. 2d 395.

No. 85–564. PROVENZANO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1077.

No. 85–565. WOODSIDE, EXECUTOR OF THE ESTATE OF WOODSIDE *v.* HOERNER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 897.

No. 85–580. MARTORANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 767 F. 2d 63.

No. 85–582. SPARROW *v.* DEVINE, DIRECTOR, U. S. OFFICE OF PERSONNEL MANAGEMENT, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 85–593. PAPPANIKOLAOU ET AL. *v.* SECRETARY OF THE ARMY. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 157.

No. 85–5001. MCCRARY, AKA EVANS *v.* FRANKLIN STATE BANK. Sup. Ct. N. J. Certiorari denied.

No. 85–5017. WIGLEY *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 467 So. 2d 429.

No. 85–5034. APPOLONEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 761 F. 2d 520.

No. 85–5056. MITCHELL *v.* DAVIS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 760 F. 2d 279.

No. 85–5090. SMITH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 127 Ill. App. 3d 1163, 483 N. E. 2d 729.

No. 85–5107. BURTON *v.* REED ET AL. C. A. 8th Cir. Certiorari denied.

No. 85–5145. MULLADY *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 85-5162. CORTEZ *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 507 Pa. 529, 491 A. 2d 111.

No. 85-5329. SMITH *v.* CITY OF PITTSBURGH. C. A. 3d Cir. Certiorari denied. Reported below: 764 F. 2d 188.

No. 85-5336. SCOTT *v.* DENTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 921.

No. 85-5344. PAGE ET AL. *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 472 So. 2d 362.

No. 85-5351. DANO *v.* SZOMBATHY. Sup. Ct. N. J. Certiorari denied. Reported below: 101 N. J. 282, 501 A. 2d 945.

No. 85-5353. MAHDAVI *v.* SHIRANI. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85-5355. WEEKS *v.* JOHNSON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-5359. KAHIKINA *v.* HAWAII. Sup. Ct. Haw. Certiorari denied. Reported below: —— Haw. ——, 744 P. 2d 775.

No. 85-5361. COLEMAN ET AL. *v.* DELAWARE ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 497 A. 2d 785.

No. 85-5366. JONES *v.* CALIFORNIA INSTITUTION FOR MEN. C. A. 9th Cir. Certiorari denied.

No. 85-5367. IN RE JAMES. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 2d 160.

No. 85-5373. REED *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 174.

No. 85-5374. BALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 1170.

No. 85-5376. HOLLIDAY *v.* HAUPTMAN, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. Certiorari denied.

No. 85-5378. BISHOP *v.* DAVIS. Sup. Ct. Ala. Certiorari denied.

No. 85–5388. MILLER *v.* ELROD, SHERIFF, ET AL. C. A. 7th Cir. Certiorari denied.

No. 85–5389. GAY *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 993.

No. 85–5393. EARL *v.* ISRAEL, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 765 F. 2d 91.

No. 85–5395. FOWLER *v.* SOUTHEAST TOYOTA DISTRIBUTORS, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 998.

No. 85–5397. WILLIAMS *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 762 F. 2d 1002.

No. 85–5398. MILLER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 65 N. Y. 2d 502, 482 N. E. 2d 892.

No. 85–5399. YOUNG *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 834.

No. 85–5402. GRADY *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 691 S. W. 2d 301.

No. 85–5403. HANDLEY ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 1401.

No. 85–5405. AMES *v.* ALASKA ET AL. C. A. 9th Cir. Certiorari denied.

No. 85–5406. DUPREE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 196 Conn. 655, 495 A. 2d 691.

No. 85–5412. MCDONALD *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 85–5415. ROBERTS *v.* RUTGERS STATE UNIVERSITY OF NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1074.

No. 85–5422. ZELLERS *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 763 F. 2d 250.

No. 85–5424. STOCKI *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 129 Ill. App. 3d 1158, 491 N. E. 2d 1386.

No. 85–5426. FULSOM *v.* MORRIS, SUPERINTENDENT, MISSOURI TRAINING CENTER FOR MEN. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 1170.

No. 85–5427. ENGLAND *v.* RYAN, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 85–5432. GOLDBLATT *v.* VOGEL ET AL. C. A. 11th Cir. Certiorari denied.

No. 85–5438. HICKS *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85–5450. CARDENAS-MONTILLA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 942.

No. 85–5452. PREWITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 916.

No. 85–5459. KOUHESTANIAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 760 F. 2d 253.

No. 85–5465. MCDOWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1076.

No. 85–5479. CRESPO-DIAZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 764 F. 2d 1514.

No. 85–5483. HATCHER ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85–5484. POQUIZ *v.* DEPARTMENT OF TRANSPORTATION. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 176.

No. 85-5490. GIVENS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 574.

No. 85-5505. PASCUEL-SOLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 173.

No. 85-5507. KOTVAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 152.

No. 85-5515. BRYANT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1164.

No. 85-5537. BRAKEFIELD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 908.

No. 85-5549. LAMB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 914.

No. 85-5582. WALKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-5597. VANOVER *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 689 S. W. 2d 11.

No. 83-1250. KEWANEE OIL CO. *v.* HOLMES, EXECUTRIX OF THE ESTATE OF HOLMES, ET AL. Sup. Ct. Kan. Certiorari denied. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 233 Kan. 544, 664 P. 2d 1335.

No. 84-1731. LORAIN JOURNAL CO. ET AL. *v.* MILKOVICH. Sup. Ct. Ohio. Certiorari denied. Reported below: 15 Ohio St. 3d 292, 473 N. E. 2d 1191.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Error and misstatement are inevitable in any scheme of truly free expression and debate. Because punishment of error may induce a cautious and restrained exercise of the freedoms of speech and press, the fruitful exercise of these essential freedoms requires a degree of "breathing space." *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). Accordingly, "we protect some falsehood in order to protect speech that matters." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 341 (1974); see also *St. Amant* v. *Thompson*, 390 U. S. 727, 732 (1968). The *New York Times* actual malice

standard defines the level of constitutional protection appropriate in the context of defamation of a public official. It rests on our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964). In *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), the *New York Times* standard was extended to statements criticizing "public figures" because we recognized that "'public figures,' like 'public officials,' often play an influential role in ordering society" and that therefore "[o]ur citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'" 388 U. S., at 164 (Warren, C. J., concurring in result). In *Gertz* v. *Robert Welch, Inc.*, *supra*, we limited the applicability of the *New York Times* standard by holding that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 418 U. S., at 347 (footnote omitted).

In this case, the Ohio Supreme Court found *Gertz* rather than *New York Times* applicable to respondent Milkovich's libel suit against petitioners. Ostensibly, then, the issue presented in this petition is simply the narrow one whether petitioners will be required to pay damages upon a showing of negligence or actual malice. However, by allowing damages to be awarded upon a showing of negligence, thereby diminishing the "breathing space" allowed for free expression in the *New York Times* case, the decision in *Gertz* exacerbated the likelihood of self-censorship with respect to reports concerning "private individuals." See 418 U. S., at 365–368 (BRENNAN, J., dissenting). Consequently, the rules we adopt to determine an individual's status as "public" or "private" powerfully affect the manner in which the press decides what to publish and, more importantly, what not to publish. In finding *New York Times* inapplicable, the Ohio Supreme Court read the "public official" and "public figure" doctrines in an exceptionally narrow way that is sure to restrict expression by the press in Ohio. Its decision is especially unfortunate in that it most affects reporting by local papers about the local controversies that constitute their primary content. Moreover, it is these local papers that are most coerced by the threat of libel damages

since they can least afford the expense of damages awards. I therefore dissent and would grant certiorari in order to review this important constitutional question.

I

On February 9, 1974, a melee occurred at a high school wrestling match between Maple Heights and Mentor High Schools; several wrestlers were injured, four of them requiring treatment at a hospital. The Ohio High School Athletic Association (OHSAA) conducted a hearing into the occurrence and censured Michael Milkovich, the Maple Heights coach and a teacher at the high school, for his conduct in encouraging the brawl. In addition, the OHSAA placed the Maple Heights team on probation for the school year and declared it ineligible to compete in the state wrestling tournament. Ted Diadiun, a sports columnist for the News-Herald of Willoughby, Ohio, attended and reported on both the match and the hearing.

A group of parents and wrestlers subsequently filed suit in Franklin County Common Pleas Court, alleging that the OHSAA had denied the team due process and seeking to reverse the declaration of ineligibility. Milkovich, though not a party to this lawsuit, appeared as a witness for the plaintiffs. On January 7, 1975, the court held that the wrestling team had been denied due process and enjoined the team's suspension.

The next day, Diadiun wrote another column entitled "Maple beat the law with the 'big lie.'" Diadiun, who had not attended the court hearing, based the story on a description of the judicial proceedings given him by an OHSAA Commissioner and on his own recollection of the wrestling match and ensuing OHSAA hearing. After reporting the result of the lawsuit, the column stated "[b]ut there is something much more important involved here than whether Maple was denied due process by the OHSAA":

> "When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.
>
> "There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way—many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and ob-

servations of their superiors and peers, from watching actions and reactions.

"Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

"A lesson which, sadly, in view of the events of the past year, is well they learned early.

"It is simply this: If you get in a jam, lie your way out."

Diadiun stated that Milkovich and others had "misrepresented" the occurrences at the OHSAA hearing but that Milkovich's testimony "had enough contradictions and obvious untruths so that the six [OHSAA] board members were able to see through it." Diadiun then asserted that by the time the court hearing was held, Milkovich and a fellow witness "apparently had their version of the incident polished and reconstructed, and the judge apparently believed them." Diadiun opined that anyone who had attended the match "knows in his heart that Milkovich . . . lied at the hearing after . . . having given his solemn oath to tell the truth. But [he] got away with it." The column concluded:

"Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

"I think not."

Milkovich filed a libel action in state court against Diadiun, the News-Herald, and the latter's parent, the Lorain Journal Company (petitioners). The court denied petitioners' motion for summary judgment, but held that Milkovich was a public figure and, as such, was required to meet the standards established in *New York Times*. After five days of trial, at the close of Milkovich's case, petitioners moved for a directed verdict. The court granted this motion, finding that Milkovich's evidence failed to establish actual malice as a matter of law. The Ohio Court of Appeals reversed and remanded. *Milkovich* v. *Lorain Journal Co.*, 65 Ohio App. 2d 143, 416 N. E. 2d 662 (1979). It noted that the Common Pleas Court had accepted Milkovich's testimony, and ruled that this alone constituted sufficient evidence of actual malice to survive a motion for a directed verdict. The Ohio Supreme Court dismissed the appeal as raising no substantial constitutional question. This Court denied certiorari; I dissented. *Lorain Journal Co.* v. *Milkovich*, 449 U. S. 966 (1980).

On remand and before a new judge in the Common Pleas Court, petitioners filed a second motion for summary judgment. The court reaffirmed the earlier holding that Milkovich was a public figure for purposes of the *New York Times* test and granted the motion. The court held that Milkovich had failed to proffer sufficient evidence for a jury to conclude that Diadiun's column was published with actual malice. Alternatively, the court found that the column constituted a privileged expression of opinion. This time the Ohio Court of Appeals affirmed, holding that the law of the case did not bar a second motion for summary judgment and agreeing with both of the trial court's particular holdings.

The Ohio Supreme Court reversed. *Milkovich* v. *News-Herald*, 15 Ohio St. 3d 292, 473 N. E. 2d 1191 (1984). Concluding "upon a careful review of the record" that Milkovich had not waived the right to challenge the earlier determination of his status as a public figure, the court held that Milkovich was neither a "public official" nor a "public figure," and that the contents of the challenged article were facts which, if false, are not protected by the First Amendment. *Id.*, at 294–297, 473 N. E. 2d, at 1193–1196. This petition followed.

II

A

In *New York Times*, we had no occasion "to determine how far down into the lower ranks of government employees the 'public official' designation would extend . . . ." 376 U. S., at 283, n. 23. That question was addressed two Terms later in *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966). Consistent with the premise of *New York Times* that "[c]riticism of those responsible for government operations must be free, lest criticism of government itself be penalized," the Court in *Rosenblatt* held that "[i]t is clear . . . that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs." 383 U. S., at 85. We recognized there, however, that First Amendment protection cannot turn on formalistic tests of how "high" up the ladder a particular government employee stands. Rather, we determined, the focus must be on the nature of the public employee's function and the public's particular concern with his work. Accordingly, we held:

> "Where a position in government has such apparent importance that the public has *an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees*, . . . the *New York Times* malice standards apply." *Id.*, at 86 (emphasis added).

In *Rosenblatt* itself, we found this standard satisfied with respect to Baer, a supervisor of a county ski resort employed by and responsible to county commissioners.

The Ohio court apparently read the language in *Rosenblatt* referring to government employees having "substantial responsibility for or control over the conduct of government affairs" as restricting the public official designation to officials who set governmental policy. This interpretation led it to conclude that finding a public employee like Milkovich to be a "public official" for purposes of defamation law "would unduly exaggerate the 'public official' designation beyond its original intendment." 15 Ohio St. 3d, at 297, 473 N. E. 2d, at 1195–1196.

The Ohio court has seriously misapprehended our decision in *Rosenblatt*. Indeed, the status of a public school teacher as a "public official" for purposes of applying the *New York Times* rule follows *a fortiori* from the reasoning of the Court in *Rosenblatt*. As this Court noted in holding that the Equal Protection Clause does not bar a State from excluding aliens from teaching positions in the public schools, "public school teachers may be regarded as performing a task 'that go[es] to the heart of representative government.'" *Ambach* v. *Norwick*, 441 U. S. 68, 75–76 (1979) (quoting *Sugarman* v. *Dougall*, 413 U. S. 634, 647 (1973)). We have repeatedly recognized public schools as the Nation's most important institution "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." 441 U. S., at 76–77. See also *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 29–30 (1973); *Wisconsin* v. *Yoder*, 406 U. S. 205, 213 (1972); *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954). The public school teacher is unquestionably the central figure in this institution:

> "Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-

to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way course material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy." *Ambach, supra,* at 78–79 (footnotes omitted).[1]

"[T]eachers . . . possess a high degree of responsibility and discretion in the fulfillment of a basic governmental obligation," *Bernal* v. *Fainter,* 467 U. S. 216, 220 (1984),[2] and it is self-evident that "the public has an independent interest in the qualifications and performance" of those who teach in the public high schools that goes "beyond the general public interest in the qualifications and performance of all government employees," *Rosenblatt, supra,* at 86.[3] Public school teachers thus fall squarely

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[1] JUSTICE BLACKMUN's dissent in *Ambach,* which I joined, expressed identical sentiments. See 441 U. S., at 88 ("One may speak proudly of the role model of the teacher, of his ability to mold young minds, of his inculcating force as to national ideals, and of his profound influence in the impartation of our society's values").

[2] See also *Board of Education* v. *Pico,* 457 U. S. 853, 864 (1982) (plurality opinion); *Cabell* v. *Chavez-Salido,* 454 U. S. 432, 457, n. 8 (1982); *Zykan* v. *Warsaw Community School Corporation,* 631 F. 2d 1300, 1307 (CA7 1980).

[3] This perfectly obvious conclusion has led at least one other court to reach a conclusion directly contrary to that of the Ohio Supreme Court. See *Johnston* v. *Corinthian Television Corp.,* 583 P. 2d 1101 (Okla. 1978) (grade school wrestling coach is "public official"). On the other hand, the state courts are in general disarray over the application of the *New York Times* standard to various other types of public employees. See Annot., Libel and Slander: Who is a Public Official or Otherwise Within the Federal Constitutional Rule

within the rationale of *New York Times* and *Rosenblatt*. Moreover, Diadiun's column challenged Milkovich's qualifications to teach young students in light of his conduct in connection with the Maple Heights/Mentor High School incident. It is precisely this type of discussion that *New York Times* and its progeny seek to protect.

B

The Ohio Supreme Court also held that Milkovich was not a "public figure" within the meaning of our decisions. It concluded that this Court has "retreated" from prior holdings and "redefined" public figure status to include only two narrowly defined classes of individuals. 15 Ohio St. 3d, at 294–297, 473 N. E. 2d, at 1193–1195. Milkovich was found to fit in neither of these categories. *Ibid.* Here too, the state court misreads our decisions.

Our first encounter with the application of the *New York Times* test to nongovernment officials came in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967). *Butts* actually decided two separate cases that were consolidated for review. In the first case, Butts, the athletic director at the University of Georgia[4] and "a well-known and respected figure in coaching ranks," *id.*, at 136, filed a libel action after the Saturday Evening Post published an article accusing Butts of having conspired to fix a football game with the University of Alabama. In the second case, Walker, a retired career Army officer who was prominent in the local community, sued the Associated Press after it filed a news dispatch giving an eyewitness account of a riot that erupted at the University of Mississippi when federal officers tried to enforce a court decree ordering the enrollment of James Meredith, a black, as a student at the University. The report stated that Walker had taken command of the violent crowd and personally had led a charge against federal marshals. Although the Court in *Butts* failed to reach a consensus on the standard of liability in suits brought by "public figures," seven Members of the Court agreed that both Butts and

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Requiring Public Officials to Show Actual Malice, 19 A. L. R. 3d 1361 (1968 and 1985 Supp.). I would also grant certiorari to clarify the law in this regard.

[4] Although the University of Georgia was a state university, Butts was employed by the Georgia Athletic Association, a private corporation, rather than by the State itself. His case thus did not raise the issue whether he was a "public official" for purposes of the *New York Times* test. See *Butts*, 388 U. S., at 135, and n. 2.

Walker occupied this status.[5] Justice Harlan explained in his plurality opinion:

> "[B]oth Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled 'public figures' under ordinary tort rules. . . . Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements." *Id.*, at 154–155.

As Justice Harlan's opinion indicates, the two cases considered in *Butts* exemplify alternative ways in which an individual may become a "public figure."[6] Our subsequent cases have elaborated on this framework; we have held that "[i]n some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts," while, "[m]ore commonly, an individual voluntarily injects himself or is drawn into a particular controversy and thereby becomes a public figure for a limited range of issues." *Gertz*, 418 U. S., at 351; see also, *Time, Inc.* v. *Firestone*, 424 U. S. 448, 453 (1976); *Hutchinson* v. *Proxmire*, 443 U. S. 111, 134 (1979); *Wolston* v. *Reader's*

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[5] Justices Black and Douglas found it unnecessary to reach the issue consistent with their views that the First Amendment completely prohibits damages for libel. *Id.*, at 170 (Black, J., joined by Douglas, J., concurring in result in Walker's case and dissenting in Butts' case); see also *New York Times*, 376 U. S., at 293 (Black, J., concurring).

[6] Like Butts and Walker, Milkovich would be labeled a "public figure" under ordinary tort rules. See W. Prosser, Law of Torts § 118, pp. 823–824 (4th ed. 1971); cf. *Stryker* v. *Republic Pictures Corp.*, 108 Cal. App. 2d 191, 238 P. 2d 670 (1951); *Molony* v. *Boy Comics Publishers*, 277 App. Div. 166, 98 N. Y. S. 2d 119 (1950); *Wilson* v. *Brown*, 189 Misc. 79, 73 N. Y. S. 2d 587 (1947). Indeed, since in my opinion the scope of the constitutional privilege exceeds that of the privilege recognized at common law for reports about public figures, this fact alone should be sufficient to conclude that Milkovich is a "public figure." However, our subsequent decisions have treated the constitutional privilege without reference to the common-law privilege, *e. g.*, *Time, Inc.* v. *Firestone*, 424 U. S. 448, 453 (1976); *Wolston* v. *Reader's Digest Assn., Inc.*, 443 U. S. 157, 165–169 (1979), and I therefore discuss Milkovich's status under our decisions without reference to the common law.

Digest Assn., Inc., 443 U. S. 157, 164 (1979). However, the ultimate touchstone is always whether an individual has "assumed [a] rol[e] of especial prominence in the affairs of society [that] invite[s] attention and comment." *Gertz*, *supra*, at 345. These categories are merely descriptive; they are not, as the Ohio Supreme Court assumed, rigid, technical standards.

Petitioners spend most of their efforts attempting to analogize their case to that of Butts, and, indeed, the analogy is a strong one.[7] A better argument can be made, however, that Milkovich is a "public figure," like Walker, for purposes of this particular public controversy. Under this prong of "public figure" analysis, an individual who "voluntarily injects himself or is drawn into a particular public controversy" becomes a public figure with respect to public discussion of that controversy. *Gertz*, *supra*, at 351. Walker, for example, was deemed to have "thrus[t] his personality into the 'vortex' of an important public controversy" by allegedly encouraging a riot. Milkovich's conduct was remarkably similar to Walker's—the allegedly libelous publication was inspired by a brawl that resulted in injuries to a number of students;

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[7] Like Butts, Milkovich is "a well-known and respected figure in coaching ranks." Indeed, he is unquestionably one of America's outstanding coaches. No other wrestling coach in America has achieved a record even close to his, a fact that has been recognized by numerous organizations. He has received the National Coach of the Year Award, the National Council of High School Coaches Award, the Scholastic Wrestling News National Achievement Award, a United States Wrestling Federation Award, and numerous other gifts, proclamations, and awards. He was inducted into the National Helms Hall of Fame and the Ohio Coaches Hall of Fame and received the Kent State University Hall of Fame Award. He has been cited in the Congressional Record and in the records of both the Ohio Senate and House of Representatives. He was similarly honored by the city of Cleveland and by his own city of Maple Heights, which celebrated "Mike Milkovich Day." He is a much sought after speaker by coaches' associations throughout the United States and conducts wrestling clinics across the country under the aegis of various state and coaches' organizations. See *Milkovich* v. *News-Herald*, 15 Ohio St. 3d 292, 296, and n. 1, 473 N. E. 2d 1191, 1194, and n. 1 (1984). Nor will it do simply to dismiss Milkovich's achievements as merely those of a high school coach. To be sure, as a general matter collegiate athletics obtains wider exposure than high school athletics. But with the exception of a few rather flamboyant figures who gain national exposure, most coaches—like Butts—are unknown outside sports' circles and the local community. Milkovich is probably as well known both locally and in the wrestling community as was Butts in his respective circles.

Milkovich was alleged to have incited the fracas by egging on the crowd. While this fight did not compare in size or ferocity to the riots in which Walker participated at the University of Mississippi, it was a public controversy of concern to residents of the local community, as important to them as larger events are to the Nation. Significantly, it was only in this community that the challenged article was circulated. See *Rosenblatt* v. *Baer*, 383 U. S., at 83 ("The subject matter may have been only of local interest, but at least here, where publication was addressed primarily to the interested community, that fact is constitutionally irrelevant"). The conclusion that Milkovich was a limited purpose public figure therefore seems quite straightforward.

The Ohio Supreme Court nevertheless concluded that Milkovich could not be classed a "public figure" because he "never thrust himself to the forefront of [the] controversy in order to influence its decision." 15 Ohio St. 3d, at 297, 473 N. E. 2d, at 1195. However, the *New York Times* standard is not limited to discussion of individuals who deliberately seek to involve themselves in public issues to influence their outcome. Our decisions in this area rest at bottom on the need to protect public discussion about matters of legitimate public concern. See *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 755–761 (1985) (opinion of POWELL, J., joined by REHNQUIST and O'CONNOR, JJ.); *id.*, at 763–764 (opinion of BURGER, C. J.); *id.*, at 777–789 (opinion of BRENNAN, J., joined by MARSHALL, BLACKMUN, and STEVENS, JJ.). Although not every person connected to a public controversy is a "public figure," *Gertz*, *supra*, the *New York Times* protections do, and necessarily must, encompass the major figures around which a controversy rages. See *Wolston* v. *Reader's Digest Assn.*, *supra*, at 167; see also *Gertz*, *supra*, at 351 (public figure is one who "voluntarily injects himself *or is drawn* into a particular public controversy" (emphasis added)).[8]

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[8] In *Wolston*, we held that although an individual's failure to appear before a grand jury investigating Soviet espionage was newsworthy, "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." 443 U. S., at 167. Rather, we emphasized, "a court must focus on the 'nature and extent of an individual's participation in the particular controversy giving rise to the defamation.'" *Ibid.* (quoting *Gertz*, 418 U. S., at 352). Because it was "clear that [Wolston] played only a minor role in whatever public controversy there may have been concerning the investigation of Soviet espio-

We only recently acknowledged the "compelling" nature of the local interest in preventing violence and preserving discipline in the Nation's high schools. *New Jersey* v. *T. L. O.*, 469 U. S. 325, 350 (1985). A large fight between the students of two rival schools quite legitimately raises serious concerns for the entire community, particularly when, as here, it results in injury to students.[9] The present controversy centered primarily around the conduct of one man—Milkovich—in encouraging the fight; that conduct allegedly resulted in an OHSAA hearing, his censure by that association, and the disqualification of his team from eligibility in the state wrestling tournament.[10] To say that Milkovich nevertheless was not a public figure for purposes of discussion about the controversy is simply nonsense.

III

The "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times*, 376 U. S., at 270, applies as much to debate in the local media about local issues as it does to debate in the na-

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nage," he was held not to be a public figure. 443 U. S., at 167. Milkovich, on the other hand, was clearly the major player in this public controversy.

[9] At one point in its opinion, the Ohio Supreme Court cited our holding in *Time, Inc.* v. *Firestone*, 424 U. S. 448 (1976), that Mrs. Firestone's divorce was "not the sort of 'public controversy' envisioned in *Gertz*." 15 Ohio St. 3d, at 296, 473 N. E. 2d, at 1194. The nature of the controversy here is completely different. This was not a private matter of public concern merely to gossips. Rather, the controversy in which Milkovich was involved was of immediate importance to parents and others in the community.

[10] These facts distinguish this case from *Hutchinson* v. *Proxmire*, 443 U. S. 111 (1979). In *Hutchinson*, a hitherto unknown research scientist was allegedly libeled when Senator Proxmire awarded his Government sponsor a "Golden Fleece of the Month Award" to publicize what the Senator perceived to be the most egregious examples of wasteful Government spending. Proxmire argued that Hutchinson became a limited purpose public figure as a result of the publicity surrounding his being awarded a "Golden Fleece." We rejected this argument on the ground that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.*, at 135. The controversy surrounding the fight at the high school, on the other hand, was not created by Diadiun's column. The event itself created a stir, leading to a hearing, censure of Milkovich, and disqualification of his team. Diadiun's column merely reported his view, as an observer of the initial fight, that such a man ought not be allowed to teach young students.

tional media over national issues. This Court's *obligation* to preserve the precious freedoms established in the First Amendment is every bit as strong in the context of a local paper's report of an incident at a local high school as it is in the context of an advertisment in one of the Nation's largest newspapers supporting the struggle for racial freedom in the South. Because the decision below will stifle public debate about important local issues, I respectfully dissent.

No. 84–1955. PERNSLEY ET AL. *v.* HARRIS ET AL. C. A. 3d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE REHNQUIST and JUSTICE O'CONNOR would grant certiorari. Reported below: 755 F. 2d 338 and 758 F. 2d 83.

CHIEF JUSTICE BURGER, dissenting.

For the past nine years, the prison system in Philadelphia has been operating under the supervision of the Court of Common Pleas of Philadelphia County, following that court's finding in 1972 that prison conditions violated both the Pennsylvania Constitution and the Eighth Amendment of the United States Constitution. Since 1976, a full-time, court-appointed Special Master has been in place and numerous remedial orders have been issued, including orders requiring the building of new prison facilities and contempt orders imposing over $500,000 in fines for failure to comply with prior orders. In addition, the parties have entered into consent decrees aimed at controlling the population in the prison system. Beginning in 1984, the Pennsylvania Supreme Court assumed plenary jurisdiction over the entire state proceeding.

The state suit commenced by the filing of a class action in 1971 on behalf of all inmates in the Philadelphia prisons, seeking equitable relief from alleged unconstitutional prison conditions; defendants are officials of Philadelphia. In the case now before us, respondent Harris, an inmate who admits he is a member of the same class represented in the state action, brought a separate class action in the Eastern District of Pennsylvania on behalf of all persons confined in the Philadelphia prisons; defendants include city and state officials. The federal complaint similarly makes claims like those in the state suit, and asserts that the Philadelphia prisons are overcrowded, thereby violating the Eighth Amendment of the United States Constitution; it seeks extensive injunctive relief and monetary damages under 42 U. S. C. § 1983.

The District Court dismissed the equitable relief claims sought in this second class action on the alternative grounds of res judicata, or abstention under the doctrine of *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800 (1976); it dismissed the damages claim on grounds of sovereign and qualified official immunity. A divided Court of Appeals for the Third Circuit reversed, rejecting each of the District Court's holdings. 755 F. 2d 338 (1985). In his dissenting opinion, Judge Garth agreed that while *Colorado River* did not support abstention, *Younger* v. *Harris*, 401 U. S. 37 (1971), mandated it:

> "I do not believe that Supreme Court teachings, comity, or reason support a federal court's intrusion into a state's administration of its prison system when the state courts have been, and presently are, exercising supervision over these institutions and are doing so in accordance with both state and federal constitutional requirements." 755 F. 2d, at 347.

Rehearing was denied over two dissents. 758 F. 2d 83 (1985).

Respondents essentially ask the federal courts to duplicate the ongoing state-court regulation of the Philadelphia prison system. The District Court recognized that the substantial and ongoing state-court proceedings involve an important state interest, namely, the administration of a prison system. The Court of Appeals nevertheless found *Younger* abstention restricted to pending state criminal or quasi-criminal proceedings initiated by the State. Our cases, however, recognize that "[t]he policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved." *Middlesex County Ethics Committee* v. *Garden State Bar Assn.*, 457 U. S. 423, 432 (1982). See also *Moore* v. *Sims*, 442 U. S. 415, 423 (1979) (the *Younger* doctrine is "fully applicable to civil proceedings in which important state interests are involved").

The *Younger* doctrine is rooted in the concept of comity, because

> "interference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies." *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 604 (1975).

There is no question that the State is a party to the ongoing state proceedings and that important state policies are implicated

in the management of the county prison system. The state courts continue to exercise comprehensive jurisdiction over the prison system's administration through use of a Special Master, by holding hearings, and by issuing remedial orders and ordering fines. Should the District Court exercise its equitable powers as sought in this second suit, the Philadelphia prisons may thus become subject to potentially conflicting and contrary determinations as to the appropriate remedy for the alleged unconstitutional conditions. Although plaintiffs here additionally seek damages, there is no bar to the assertion of that claim in the state proceedings. So long as plaintiffs have an opportunity to raise their federal claims in the state action, "[n]o more is required to invoke *Younger* abstention." *Juidice* v. *Vail*, 430 U. S. 327, 337 (1977).

I would grant the writ of certiorari and reverse the Court of Appeals judgment.

No. 84–1990. JOHNSON *v.* REX. C. A. 10th Cir. Certiorari denied. Reported below: 753 F. 2d 840.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

In this case the United States Court of Appeals for the Tenth Circuit held that a prosecutor is not entitled to absolute immunity from liability in a civil rights suit brought under 42 U. S. C. § 1983 based upon the prosecutor's presence during questioning of the plaintiff. Absolute immunity was denied even though the prosecutor was present not as an investigator but as a counsel to advise on compliance with *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

In *Imbler* v. *Pachtman*, 424 U. S. 409 (1976), this Court established an absolute immunity for prosecutors engaged in activities associated with the criminal process. This Court left open the extent to which investigative activities by prosecutors would also come within the umbrella of absolute immunity. But the principle of absolute immunity established in *Imbler* was based on the need to ensure sound decisionmaking by the prosecutor by protecting from fear of retaliatory suits for vigorous law enforcement. Here the prosecutor was acting as an officer of the court in ensuring compliance with the *Miranda* requirements, and I would grant the petition for certiorari in order to define the applicability of absolute immunity in this context; surely the prosecutor's action was well within his function as a prosecutor and officer of the court.

No. 85–3. ATLANTA GAS LIGHT CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 11th Cir. Motion of Georgia-Pacific Corp. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 751 F. 2d 1188.

No. 85–78. ALASKA *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 754 F. 2d 851.

No. 85–84. HAGERTY *v.* KELLER, EXECUTOR OF THE SUCCESSION OF CLEMENT, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 749 F. 2d 217.

CHIEF JUSTICE BURGER.

I agree that we should deny the petition for certiorari, but I would award respondents costs and fees under Rule 49.2. The time has come—indeed it is long past—when the Court should enforce Rule 49.2 or strike it. This petition, like much which preceded it, is utterly frivolous. On this record I can only conclude that petitioner and his counsel have filed actions designed to delay the orderly settlement of the estate of respondent Keller's decedent. This misuse of judicial processes should subject the attorney who filed the petition here to the sanction of Rule 49.2.[1]

On July 14, 1978, petitioner brought suit in Louisiana state court to contest the probate of the will of his aunt, Laura Clement. Petitioner requested and received no fewer than three continuances. The trial was finally set for May 12, 1980. Three days before trial, petitioner requested and was denied a fourth continuance.

On the day of trial, petitioner appeared before Judge Melvin Duran, objected to the proceedings, offered no evidence, and stood mute. Judge Duran accordingly dismissed the suit with prejudice. The intermediate state appellate court unanimously affirmed. *Succession of Clement*, 402 So. 2d 702 (La. App. 1981). That court noted that petitioner had "succeeded in delaying implementation of Mrs. Clement's bequests for three years, possibly longer if this matter goes to a higher court." *Id.*, at 703. The court concluded that Judge Duran had not abused his discretion, after granting three continuances, in refusing to grant a fourth.

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[1] Rule 49.2 provides: "When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages."

The Louisiana Supreme Court unanimously declined to review the case. 407 So. 2d 733 (1981).

Petitioner then brought a 42 U. S. C. § 1983 action in the United States District Court for the Eastern District of Louisiana. Petitioner contended that the state trial court, by refusing his request for a fourth continuance, had deprived him of due process of law. He named as defendants the Clerk of the Orleans Parish Civil District Court, Dan Foley; the Succession of Laura Clement; the executor of the will, Thomas Keller; and Judge Duran. The defendants, respondents in this Court, moved for dismissal of the action. The District Court correctly granted the motion, concluding that the complaint should be dismissed for lack of subject-matter jurisdiction and for failure to state a claim. Petitioner then took an appeal to the United States Court of Appeals for the Fifth Circuit.

That court unanimously affirmed, holding that the District Court had properly dismissed the action on jurisdictional grounds. 749 F. 2d 217 (1984). Petitioner's suit was brought in the face of the "well-settled rule" that a plaintiff may not seek reversal of a state-court judgment simply by casting his complaint in the form of a civil rights action; Supreme Court and Fifth Circuit precedent "clearly prohibit[ed]" the effort made by petitioner. The Court of Appeals also held that the District Court had properly dismissed petitioner's suit for failure to state a claim. The court explained that ordinarily it would not be inclined to give this issue any attention since the District Court's judgment in its entirety could be affirmed for lack of subject-matter jurisdiction. However, "to further demonstrate the frivolousness of the appeal," the court addressed this point as well, concluding that the trial court had properly dismissed the claims against all defendants on this basis.[2]

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[2] Petitioner had named as a defendant Dan Foley, the Clerk of the Orleans Parish Civil District Court. But Foley was without any power or authority under state law to grant or deny continuances. Moreover, there was no allegation that Foley was involved in any sort of a conspiracy to deprive petitioner of his constitutional rights. Indeed, the complaint did not even allege any act or omission on Foley's part that caused injury. Petitioner had also named the succession of Laura Clement and Thomas Keller, the executor of the estate, as defendants. But, the Fifth Circuit noted, in order to sustain an action under § 1983, the plaintiff must prove that the defendant, acting under color of state law, deprived him of a right secured by the Constitution and laws of the United States. Petitioner had not alleged that either the succession or Keller had conspired with the state trial court. In fact, petitioner's complaint contained no allegation or facts concerning either of these defend-

The court assessed double costs and fees against both petitioner and his attorney under Federal Rule of Appellate Procedure 38 and under 28 U. S. C. §§ 1912 and 1927; it held that petitioner had imposed an unnecessary burden on it and had infringed upon the right of respondents to have a prompt adjudication of this dispute. The court noted, however, that awarding costs against petitioner alone would not deter his attorney from bringing similar frivolous appeals in the future. The court therefore remanded to the District Court for an apportionment of the amount of damages between petitioner and his attorney.

Petitioner continued to protract these proceedings by seeking a writ of certiorari in this Court. In his filing to this Court, however, petitioner did not attempt to refute the careful analysis of the Court of Appeals. Although petitioner was clearly confronted with numerous adverse precedents from this Court and from other courts, he advanced no "good faith argument for an extension, modification, or reversal of existing law." ABA Code of Professional Responsibility DR 7–102(A)(2) (1980).

It is evident, therefore, that petitioner and his counsel have filed in this Court a completely frivolous petition as the most recent in a series of patently unfounded suits, whose effect has been to keep issues involving decedent's will in state and federal courts for more than seven years. Since this appears to be a case where "unmeritorious litigation has been prolonged merely for the purposes of delay, with no legitimate prospect of success," *Talamini* v. *Allstate Insurance Co.*, 470 U. S. 1067, 1071 (1985) (STEVENS, J., concurring), I would award respondents $1,000 against Jesse S. Guillot, Esq., petitioner's attorney.

No. 85–257. GRACZYK ET AL. *v.* UNITED STEELWORKERS OF AMERICA. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 763 F. 2d 256.

No. 85–356. OMAN ET AL. *v.* H. K. PORTER CO. ET AL. C. A. 4th Cir. Motions of Blatt & Fales, Henderson & Goldberg, P. C.,

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ants, only the conclusion that petitioner was entitled to damages from them. Finally, the Fifth Circuit considered the claims against state trial judge Melvin Duran. Judges are clearly entitled to absolute immunity from § 1983 suits involving actions taken in their judicial capacity. Petitioner had sued Judge Duran only because he exercised his judicial discretion in a case properly before his court.

Association of Trial Lawyers of America, and Asbestos Victims of America for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 764 F. 2d 224.

No. 85–364. DEPARTMENT OF SOCIAL SERVICES OF RUSK COUNTY ET AL. *v.* J. C. Ct. App. Wis. Motion of National Association of Counsel for Children for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 124 Wis. 2d 776, 370 N. W. 2d 293.

No. 85–366. KING *v.* LOVE. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 766 F. 2d 962.

No. 85–388. DILLON *v.* POTOMAC HOSPITAL CORP. Sup. Ct. Va. Motion of Virginia Brown et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 229 Va. 355, 329 S. E. 2d 41.

No. 85–463. MEYERS INDUSTRIES, INC. *v.* PRILL ET AL. C. A. D. C. Cir. Motion of petitioner for leave to intervene denied. Certiorari denied. Reported below: 244 U. S. App. D. C. 42, 755 F. 2d 941.

No. 85–482. FIRESTONE TIRE & RUBBER CO. *v.* COUSINEAU, PERSONAL REPRESENTATIVE OF THE ESTATE OF COUSINEAU, ET AL. Ct. App. Mich. Motion of National Association of Manufacturers for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 140 Mich. App. 19, 363 N. W. 2d 721.

No. 85–607. BURCHE *v.* CATERPILLAR TRACTOR CO. C. A. 7th Cir. Motion of respondent to strike purported revision of the petition denied. Certiorari denied.

No. 85–5046. ADAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 759 F. 2d 1099.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

This case presents the issue of the agreement necessary to support a conviction for so-called RICO conspiracy. For his part in a large-scale narcotics distribution scheme, petitioner Adams was convicted of both the substantive RICO offense defined by 18

U. S. C. § 1962(c)* and conspiracy to commit this offense. Petitioner requested a jury instruction that he could not be found guilty on the conspiracy count unless the evidence showed that he had personally agreed to commit two acts of racketeering activity. The District Judge refused this instruction. In affirming petitioner's RICO conspiracy conviction, the United States Court of Appeals for the Third Circuit held that, to be convicted of conspiracy to violate § 1962(c), a defendant need only agree to the commission of two predicate acts of racketeering activity, and need not agree to personally commit those acts. 759 F. 2d 1099, 1116 (1985).

The Courts of Appeals disagree as to the proper interpretation of 18 U. S. C. § 1962(d), the RICO conspiracy statute. Some require, as the predicate for conviction under § 1962(d) of conspiracy to violate § 1962(c), an agreement to personally commit two acts of racketeering activity. See, *e. g.*, *United States* v. *Ruggiero*, 726 F. 2d 913, 921 (CA2), cert. denied *sub nom. Rabito* v. *United States*, 469 U. S. 831 (1984); *United States* v. *Winter*, 663 F. 2d 1120, 1136 (CA1 1981), cert. denied, 460 U. S. 1011 (1983). Other Courts of Appeals agree with the Third Circuit that § 1962(d) also makes unlawful an agreement that another violate § 1962(c) by committing two acts of racketeering activity. See, *e. g.*, *United States* v. *Carter*, 721 F. 2d 1514, 1529–1531 (CA11), cert. denied *sub nom. Morris* v. *United States*, 469 U. S. 819 (1984).

Surprisingly, even the Government's interpretation of the RICO conspiracy statute has not been wholly consistent. In *Winter*, *supra*, the Government conceded that a count under § 1962(d) of conspiracy to violate § 1962(c) requires proof that the defendant "agreed to commit personally two or more predicate crimes constituting a pattern of racketeering activity." 663 F. 2d, at 1136.

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*In writing the Racketeer Influenced and Corrupt Organizations Act, 18 U. S. C. § 1961 *et seq.*, Congress defined three new substantive offenses, 18 U. S. C. §§ 1962(a), (b), (c), and also made it unlawful to conspire to commit these substantive offenses, 18 U. S. C. § 1962(d). Title 18 U. S. C. § 1962(c), the relevant substantive offense in this case, provides:

"It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

Title 18 U. S. C. § 1961(5) provides that the term "pattern of racketeering activity" requires at least two acts of racketeering activity, a term which in turn is defined at 18 U. S. C. § 1961(1).

In other cases, including this one, the Government has argued for the interpretation of § 1962(d) adopted by the Third Circuit.

"The legislative history [of the RICO statute] clearly demonstrates that [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello* v. *United States*, 464 U. S. 16, 26 (1983). If the Third Circuit's interpretation of § 1962(d) is correct, Congress' intent is being frustrated in those circuits which adhere to the narrower view of RICO conspiracy. If the Third Circuit's interpretation is incorrect, defendants are being exposed to conviction for behavior Congress did not intend to reach under § 1962(d). I would grant certiorari to resolve the conflict among the Courts of Appeals.

No. 85–5141. DEGARMO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 691 S. W. 2d 657.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), six Justices concluded that a capital sentencing scheme that directs and limits the jury's discretion minimizes the risk of arbitrary and freakish imposition of the death penalty and thereby cures the defects that led the Court in *Furman* v. *Georgia*, 408 U. S. 238 (1972), to invalidate capital punishment as unconstitutionally cruel and unusual. I dissented in *Gregg* because I do not believe that the unconstitutionality of capital punishment depends upon the procedures under which the penalty is inflicted. In my view, the constitutional infirmity in the punishment of death is that "it treats 'members of the human race as nonhumans, as objects to be toyed with and discarded'" and is thus "'inconsistent with the fundamental premise of the [Eighth Amendment] that even the vilest criminal remains a human being possessed of common human dignity.'" *Gregg*, *supra*, at 230 (BRENNAN, J., dissenting) (quoting *Furman* v. *Georgia*, *supra*, at 273).

I have adhered to this view that capital punishment is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. I do so again today. But even if I agreed that capital punishment is constitutional if imposed in a rational and nondiscriminatory manner, I remain convinced that the Court deludes itself when it insists that the infliction of the death penalty, as currently administered, is not

arbitrary or capricious under any meaningful definition of those terms. See *Pulley* v. *Harris*, 465 U. S. 37, 59 (1984) (BRENNAN, J., dissenting). This case demonstrates just one way in which capital sentencing schemes have failed to eliminate arbitrariness in the choice of who is put to death.

With the aid of Helen Mejia, Roger DeGarmo kidnaped and murdered a young woman. DeGarmo was subsequently convicted of capital murder and condemned to die by lethal injection. As part of a plea bargain, Mejia—whose participation made her equally subject to prosecution under the capital murder statute—received a sentence of only 10 years' deferred probation. In other words, while the State sought and may soon succeed in putting DeGarmo to death, it did not care to see his accomplice serve even a day in jail for participating in the same offense. This gross disparity in treatment is solely a product of the prosecutor's unfettered discretion to choose who will be put in jeopardy of life and who will not.*

I believe that such a disparity in treatment is alone sufficient grounds to set aside DeGarmo's death sentence as disproportionate under the circumstances. Cf. *Pulley* v. *Harris*, *supra*, at 43; *Solem* v. *Helm*, 463 U. S. 277 (1983). More importantly, however, this disparity in treatment highlights the utter failure of the elaborate sentencing schemes approved by the Court in *Gregg* and its companion cases to meaningfully limit the arbitrary infliction of

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*Although Mejia testified for the State at trial, the prosecutor's decision to let her go free was not needed to obtain DeGarmo's conviction. Mejia's plea and sentence were not entered until over 18 months after DeGarmo's trial. On appeal, DeGarmo alleged that the State had offered this remarkably lenient deal to Mejia *before* his trial to persuade her to testify. DeGarmo argued that the prosecutor's failure to disclose this promise violated his right to have the agreement disclosed to the jury. See *Giglio* v. *United States*, 405 U. S. 150 (1972). The State responded that the agreement to let Mejia off on probation was made after DeGarmo's trial and that, at the time of the trial, Mejia was promised only that she would not be prosecuted for capital murder. Without a hearing and based solely on the record on appeal, the Texas Court of Criminal Appeals accepted the State's version of the facts. Of course, DeGarmo may raise this claim again in federal habeas proceedings, and, if the district judge so orders, may obtain a hearing to show that such was not the case. See 28 U. S. C. § 2254(d). However, in the absence of contrary findings, I accept the conclusions of the state court. Based on these facts, the decision not to seek at least imprisonment for Mejia while seeking the death penalty for DeGarmo is puzzling.

death by the States. When *Gregg* was decided several Members of the Court expressed the belief that channeling juror discretion would minimize the risk that the death penalty "would be imposed on a capriciously selected group of offenders," thereby making it unnecessary to channel discretion at earlier stages in the criminal justice system. See *Gregg*, *supra*, at 199 (opinion of Stewart, POWELL, and STEVENS, JJ.). But discrimination and arbitrariness at an earlier point in the selection process nullify the value of later controls on the jury. The selection process for the imposition of the death penalty does not begin at trial; it begins in the prosecutor's office. His decision whether or not to seek capital punishment is no less important than the jury's. Just like the jury, then, where death is the consequence, the prosecutor's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." 428 U. S., at 189.

Instead, the decisions whether to prosecute, what offense to prosecute, whether to plea bargain or not to negotiate at all are made at the unbridled discretion of individual prosecutors. The prosecutor's choices are subject to no standards, no supervision, no controls whatever. There are, of course, benefits associated with granting prosecutors so much discretion, but there are also costs. Some of these costs are simply accepted as part of our criminal justice system. But if the price of prosecutorial independence is the freedom to impose death in an arbitrary, freakish, or discriminatory manner, it is a price the Eighth Amendment will not tolerate. I dissent and would grant the petition in order to vacate the sentence below.

No. 85–5417. EDMONDS *v.* VIRGINIA. Sup. Ct. Va.;

No. 85–5478. MARTINEZ-VILLAREAL *v.* ARIZONA. Sup. Ct. Ariz.;

No. 85–5486. BOOKER *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.; and

No. 85–5548. KENNEDY *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: No. 85–5417, 229 Va. 303, 329 S. E. 2d 807; No. 85–5478, 145 Ariz. 441, 702 P. 2d 670; No. 85–5486, 764 F. 2d 1371; No. 85–5548, 472 So. 2d 1106.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153,

227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

NOVEMBER 6, 1985

Dismissal Under Rule 53

No. 85-635. LIBBEY-OWENS-FORD CO. ET AL. *v.* SHATTERPROOF GLASS CORP. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 758 F. 2d 613.

NOVEMBER 8, 1985

Miscellaneous Order

No. A-362. UKRAINIAN-AMERICAN BAR ASSN., INC., ET AL. *v.* SHULTZ, SECRETARY OF STATE, ET AL. Application for injunctive relief, or in the alternative to treat the application as a petition for writ of habeas corpus, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

NOVEMBER 12, 1985

Appeals Dismissed. (See also No. 85-390, *infra.*)

No. 85-485. GIBSON *v.* BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY OF WISCONSIN. Appeal from Sup. Ct. Wis. dismissed for want of substantial federal question. Reported below: 124 Wis. 2d 466, 369 N. W. 2d 695.

No. 85-497. IN RE MATTER OF N. P. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 361 N. W. 2d 386.

Certiorari Granted—Reversed and Remanded. (See No. 84-1852, *ante*, p. 28.)

Certiorari Granted—Vacated and Remanded

No. 85-5271. FELDER *v.* ALABAMA. Sup. Ct. Ala. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Ake* v. *Oklahoma*, 470 U. S. 68 (1985). Reported below: 470 So. 2d 1330.

Miscellaneous Orders

No. — - ——. BARKER ET AL. *v.* E. I. DU PONT DE NEMOURS & CO., INC., ET AL. Motion to direct the Clerk to file the petition

for writ of certiorari out of time denied. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. A–301. MAINSAH *v.* IMMIGRATION AND NATURALIZATION SERVICE. Application for stay of deportation, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–345. IN RE ALEXANDER. Ct. App. D. C. Application for recall and stay of mandate, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. D–506. IN RE DISBARMENT OF DANIELS. Disbarment entered. [For earlier order herein, see 472 U. S. 1024.]

No. D–509. IN RE DISBARMENT OF ALEXANDER. It is ordered that Harry Toussaint Alexander, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–510. IN RE DISBARMENT OF CODY. Disbarment entered. [For earlier order herein, see 473 U. S. 930.]

No. D–514. IN RE DISBARMENT OF LEBOVITZ. Disbarment entered. [For earlier order herein, see 473 U. S. 931.]

No. D–517. IN RE DISBARMENT OF SABISTON. It having been reported to the Court that William Devine Sabiston, Jr., has died, the rule to show cause, heretofore issued on September 18, 1985 [473 U. S. 931], is hereby discharged.

No. 84–1279. DELAWARE *v.* VAN ARSDALL. Sup. Ct. Del. [Certiorari granted, 473 U. S. 923.] Motion of respondent for divided argument denied.

No. 84–2030. BROWN-FORMAN DISTILLERS CORP. *v.* NEW YORK STATE LIQUOR AUTHORITY. Ct. App. N. Y. [Probable jurisdiction noted, *ante*, p. 814.] Motion of appellant to dispense with printing the joint appendix denied. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

No. 84–6270. GREEN ET AL. *v.* MANSOUR, DIRECTOR, MICHIGAN DEPARTMENT OF SOCIAL SERVICES. C. A. 6th Cir. [Certiorari granted, 471 U. S. 1003.] Motion of petitioners for leave to file a supplemental brief after argument granted.

No. 85–195. ICICLE SEAFOODS, INC. *v.* WORTHINGTON ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 900.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 85–246. UNITED STATES *v.* DION. C. A. 8th Cir. [Certiorari granted, *ante*, p. 900.] Motion for appointment of counsel granted, and it is ordered that Terry L. Pechota, Esquire, of Rapid City, S. D., be appointed to serve as counsel for respondent in this case.

No. 85–441. ROBERTS, COMMISSIONER OF LABOR OF THE STATE OF NEW YORK *v.* BURLINGTON INDUSTRIES, INC.; and

No. 85–460. GILBERT ET AL. *v.* BURLINGTON INDUSTRIES, INC. Appeals from C. A. 2d Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 85–5434. IN RE SMITH-BEY; and

No. 85–5443. IN RE JACKSON. Petitions for writs of mandamus denied.

Probable Jurisdiction Postponed

No. 85–488. OHIO CIVIL RIGHTS COMMISSION ET AL. *v.* DAYTON CHRISTIAN SCHOOLS, INC., ET AL. Appeal from C. A. 6th Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 766 F. 2d 932.

Certiorari Granted

No. 85–434. UNITED STATES *v.* JAMES ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 760 F. 2d 590.

No. 85–437. ARCARA, DISTRICT ATTORNEY OF ERIE COUNTY *v.* CLOUD BOOKS, INC., DBA VILLAGE BOOK & NEWS STORE, ET AL. Ct. App. N. Y. Certiorari granted. Reported below: 65 N. Y. 2d 324, 480 N. E. 2d 1089.

No. 85–519. RANDALL ET AL. *v.* LOFTSGAARDEN ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 768 F. 2d 949.

No. 85–93. BAZEMORE ET AL. *v.* FRIDAY ET AL.; and

No. 85–428. UNITED STATES ET AL. *v.* FRIDAY ET AL. C. A. 4th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 751 F. 2d 662.

No. 85–390. CITY OF LOS ANGELES ET AL. *v.* PREFERRED COMMUNICATIONS, INC. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari granted. Reported below: 754 F. 2d 1396.

No. 85–5404. ALLEN *v.* ILLINOIS. Sup. Ct. Ill. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 107 Ill. 2d 91, 481 N. E. 2d 690.

Certiorari Denied

No. 84–1992. GREEN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 465 So. 2d 999.

No. 84–6701. MCGAHARAN *v.* JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied.

No. 84–6736. GOUDLOCK *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 865.

No. 84–6881. BEANS *v.* BLACK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 757 F. 2d 933.

No. 84–6905. SHABAZZ *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84–6914. SIMONS *v.* MONTGOMERY COUNTY DEPARTMENT OF PAROLE AND PROBATIONS. C. A. 4th Cir. Certiorari denied. Reported below: 765 F. 2d 139.

No. 84–6940. MOORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 751 F. 2d 1528.

No. 84–6959. MONTGOMERY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 19.

No. 84–6986. OCHOA *v.* LENNON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 1345.

No. 85–144. MOSS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 758 F. 2d 211.

No. 85–300. EVANS *v.* UNITED STATES DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 180.

No. 85–318. EL SHAHAWY *v.* ELLIOTT. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 696.

No. 85–358. KENNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1077.

No. 85–423. THOMAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 763 F. 2d 897.

No. 85–425. REYNOLDS *v.* FLORIDA. Cir. Ct. Fla., Escambia County. Certiorari denied.

No. 85–442. ECKELS, COUNTY COMMISSIONER, HARRIS COUNTY, TEXAS *v.* GREATER HOUSTON CHAPTER OF THE AMERICAN CIVIL LIBERTIES UNION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 755 F. 2d 426 and 763 F. 2d 180.

No. 85–447. MAX DAETWYLER CORP. *v.* MEYER. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 290.

No. 85–462. MULLEN *v.* SKINNER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 999.

No. 85–467. ILLINOIS PRO-LIFE COALITION, INC., III *v.* KEITH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 764 F. 2d 1265.

No. 85–468. BOARDMAN ET AL. *v.* UNITED SERVICES AUTOMOBILE ASSN. C. A. 5th Cir. Certiorari denied. Reported below: 768 F. 2d 718.

No. 85–470. CORTEZ ET UX., INDIVIDUALLY AND DBA CORTEZ AGENCY *v.* UNAUTHORIZED PRACTICE COMMITTEE, STATE BAR OF TEXAS. Sup. Ct. Tex. Certiorari denied. Reported below: 692 S. W. 2d 47.

No. 85–475. MINTZ *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 85–476. BLANKFIELD *v.* TEXAS STATE BOARD OF DENTAL EXAMINERS. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied.

No. 85–477. PHILADELPHIA ELECTRIC CO. *v.* HERCULES INC. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 303.

No. 85-478. PAR PHARMACEUTICAL, INC. *v.* MERCK & CO., INC. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1072.

No. 85-481. STANLEY *v.* AUBERT ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85-510. SIMMONS ET AL. *v.* CAMDEN COUNTY BOARD OF EDUCATION ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 1187.

No. 85-536. MIR *v.* FOSBURG ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 933.

No. 85-557. SIERRA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 152.

No. 85-563. SHEFFIELD *v.* NORTH CAROLINA STATE BAR. Ct. App. N. C. Certiorari denied. Reported below: 73 N. C. App. 349, 326 S. E. 2d 320.

No. 85-577. HAAS *v.* WEINER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 765 F. 2d 123.

No. 85-595. DELLA PORTA *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 182.

No. 85-597. TYPHOON CAR WASH, INC. *v.* MOBIL OIL CORP. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 770 F. 2d 1085.

No. 85-605. VILLANO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-620. HELMINSKI, ET AL., AS NEXT FRIENDS OF HELMINSKI *v.* AYERST LABORATORIES. C. A. 6th Cir. Certiorari denied. Reported below: 766 F. 2d 208.

No. 85-643. MUHAMMAD, AKA JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 763 F. 2d 518.

No. 85-5086. POWELL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 485 A. 2d 596.

No. 85-5105. HUDSON *v.* MORAN, SHERIFF, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 1027.

No. 85–5117. BROWN *v.* NEWSOME, SUPERINTENDENT, GEORGIA STATE PRISON, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85–5131. PRESSLEY *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 469 So. 2d 908.

No. 85–5133. SAILOR *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 65 N. Y. 2d 224, 480 N. E. 2d 701.

No. 85–5140. PITTS *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 753 F. 2d 689.

No. 85–5167. HEMPHILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 922.

No. 85–5185. TAYLOR *v.* BEST ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 220.

No. 85–5230. HELLER *v.* BOYD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 1022.

No. 85–5237. CORNETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 922.

No. 85–5408. DISE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 763 F. 2d 586.

No. 85–5421. LOWE *v.* COX COMMUNICATIONS, INC. Ct. App. Ga. Certiorari denied. Reported below: 173 Ga. App. 812, 328 S. E. 2d 384.

No. 85–5425. PITTMAN *v.* BLACK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 764 F. 2d 545.

No. 85–5428. PRESTON *v.* TEXAS. Ct. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. Reported below: 675 S. W. 2d 598.

No. 85–5433. SANCHEZ *v.* ROTH ET AL. C. A. 9th Cir. Certiorari denied.

No. 85–5436. IN RE STURM. Sup. Ct. Cal. Certiorari denied.

No. 85–5444. LEWINGDON ET AL. *v.* OHIO ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 85–5457. FORSYTH *v.* LARSEN, ACTING WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 911.

No. 85–5461. BRAY *v.* DODGE COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85–5463. WESER *v.* SAFFELS, JUDGE, UNITED STATES DISTRICT COURT, DISTRICT OF KANSAS. C. A. 10th Cir. Certiorari denied.

No. 85–5469. MOORE *v.* RICE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 912.

No. 85–5480. WOLD *v.* LERNER. C. A. 7th Cir. Certiorari denied.

No. 85–5492. GAY *v.* HENRY, PROTHONOTARY, SUPERIOR COURT OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 85–5499. BROWN *v.* BELZ. C. A. 11th Cir. Certiorari denied.

No. 85–5501. DARUD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 85–5526. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 915.

No. 85–5558. GOODPASTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 769 F. 2d 374.

No. 85–5559. CALHOUN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 18 Ohio St. 3d 373, 481 N. E. 2d 624.

No. 85–5574. WICKHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 2d 162.

No. 85–5575. VIGNE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 85–5579. MITCHELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 765 F. 2d 130.

No. 85–5580. PELLETIER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 171.

No. 85–5586. ALLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1083.

No. 85–5621. DIMAGGIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 772 F. 2d 902.

No. 85–5622. HUTCHINGS VON LUDWITZ *v.* UNITED STATES PAROLE COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 84–6838. BARRETT *v.* UNITED STATES CUSTOMS SERVICE ET AL. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* granted, and order entered October 7, 1985 [*ante*, p. 812], denying leave to proceed *in forma pauperis* vacated. Certiorari denied. Reported below: 753 F. 2d 1074.

No. 85–8. MCCOMMON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 467 So. 2d 940.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

It is well recognized that the Fourth Amendment "imposes substantive standards for searches and seizures; but with them one of the important safeguards it establishes is a procedure; and [that] central to this procedure is an independent control over the actions of officers effecting searches of private premises." *Abel* v. *United States*, 362 U. S. 217, 251–252 (1960) (BRENNAN, J., dissenting). Thus this Court has long insisted that the determination whether probable cause exists to support a search warrant be made by "a *neutral* and *detached* magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948) (emphasis added). See also *United States* v. *Leon*, 468 U. S. 897, 913–914 (1984); *Illinois* v. *Gates*, 462 U. S. 213, 240 (1983); *Lo-Ji Sales, Inc.* v. *New York*, 442 U. S. 319, 326–327 (1979); *United States* v. *Chadwick*, 433 U. S. 1, 9 (1977); *Shadwick* v. *City of Tampa*, 407 U. S. 345, 350 (1972); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 450 (1971); *Aguilar* v. *Texas*, 378 U. S. 108, 111 (1964); *Giordenello* v. *United States*, 357 U. S. 480, 486 (1958); *United States* v. *Lefkowitz*, 285 U. S. 452, 464 (1932). Just two Terms ago in *United States* v. *Leon*, *supra*, the Court vigorously reaffirmed that the probable-cause decision must be made by a neutral and detached magistrate, stating that "the courts must . . . insist that the magistrate purport to 'perform his "neutral and detached" function and not serve merely as a rubber stamp for the police.'" *Id.*, at 914 (quoting *Aguilar* v. *Texas*, *supra*, at 111). And, as we explained in *Shadwick* v. *City of Tampa*, *supra*, at 350, "[w]hatever else neutrality and detach-

ment might entail, it is clear that they require severance and disengagement from activities of law enforcement." Today the Court refuses to act on its convictions, denying certiorari in a case in which the judge who issued the search warrant indisputably "rubber-stamped" the police request.

In this case, a large quantity of marijuana was discovered in the trunk of petitioner's automobile when it was searched pursuant to a warrant. Petitioner challenged the validity of the warrant at a pretrial suppression hearing, arguing that it was not supported by probable cause. The judge who granted the warrant testified at the hearing. With remarkable candor, he explained that he had relied principally on the fact that *police officers* had asked for the warrant, rather than on the underlying facts and circumstances set forth in the affidavit. The pertinent portion of the judge's testimony on cross-examination follows:

> "Q. You would have issued [the search warrant even if a certain statement in the affidavit either had not been included or the judge had known it not to be true]?
> "A. Certainly, because the officer—you've got to have enough faith and confidence in the officer that's asking for the search warrant to warrant it for him and then if it proves it's invalid, well, or whatever, there's nothing there what they're hunting—that's not the first time I ever made a Search Warrant.
> "Q. So, you were relying on the fact that these officers were of the law—
> "A. Of the law sworn—
> "Q. —and they were in there—they were sworn officers—
> "A. That's right.
> "Q. —they were in there telling you that this fellow was a drug dealer and they wanted to search his car—
> "A. That's exactly right.
> "Q. —and you relied on that rather than any particulars of this thing?
> "A. That's right.
> . . . . .
> "Q. So, you really issued the Search Warrant because you were asked for it by two sworn officers of law rather than any particular thing they told you?
> "A. Well, I based my decision not primarily on that, but because—if Sheriff Jones walked in there and said, 'Judge,

I need a Search Warrant to search John Doe for Marijuana,' drugs or whatever—liquor or whatever it might be, I'm going to go on his word because he's—I take him to be an honest law enforcement officer and he needs help to get in to search these places and it's my duty to help him to fulfill that.

"Q. Okay. And it's really based on the request other than any particular thing he might tell you?

"A. That's right. That's right.

"Q. And that's what the situation was here?

"A. Well, if I didn't feel like it was warranted, now, then, naturally, I wouldn't issue it.

"Q. Okay, but . . . the swaying fact was that this was two sworn officers of the law rather than anything they told you in these Underlying Facts and Circumstances?

"A. That's right. They were officers of the Narcotics."

The trial court rejected petitioner's arguments and admitted the evidence. The Mississippi Supreme Court affirmed petitioner's conviction, holding both that the warrant was supported by probable cause and that the conduct of the judge who signed the warrant, although not a model of judicial deportment, had satisfied the constitutional requirements of detachment and neutrality. 467 So. 2d 940 (1985).

Respondent argues before this Court that even if the judge failed to evaluate the request for the warrant in a neutral and detached fashion, the warrant was nonetheless valid because it was, in fact, supported by probable cause.* This attempt to evade review of the judge's lack of independence should not succeed. In

*Relying on *Carroll* v. *United States*, 267 U. S. 132 (1925), *Chambers* v. *Maroney*, 399 U. S. 42 (1970), and *Texas* v. *White*, 423 U. S. 67 (1975), respondent also argues that the instant case involves an automobile search that is supported by probable cause and thus no search warrant was required. Apart from my view that automobile searches presenting no exigent circumstances should be fully subject to the Fourth Amendment's warrant requirement, see, *e. g.*, *United States* v. *Johns*, 469 U. S. 478, 488–489 (1985) (BRENNAN, J., joined by MARSHALL, J., dissenting); *United States* v. *Ross*, 456 U. S. 798, 836–837 (1982) (MARSHALL, J., joined by BRENNAN, J., dissenting); *South Dakota* v. *Opperman*, 428 U. S. 364, 384 (1976) (MARSHALL, J., joined by BRENNAN and Stewart, JJ., dissenting), respondent may not be heard to make this argument since it appears that it was not advanced below, see, *e. g.*, *Illinois* v. *Gates*, 462 U. S. 213, 221–224 (1983).

Coolidge v. *New Hampshire*, 403 U. S., at 450–451, we firmly rejected the argument that "the existence of probable cause renders noncompliance with the warrant procedure an irrelevance." Indeed, in *Coolidge* the Court declared that because the warrant was not issued by "the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all." *Id.*, at 453.

As the transcript of the suppression hearing clearly demonstrates, the judge who issued the warrant to search petitioner's automobile, although formally separate from law enforcement officials, viewed himself as a facilitator of police investigations and simply acquiesced in police requests, without giving serious and independent consideration to the facts set forth in supporting affidavits. The Court's failure to grant certiorari in this case suggests that our admonitions that probable cause must be determined by a neutral and detached magistrate are hollow pronouncements.

I find the Court's refusal to take this case particularly disturbing in light of the good-faith exception to the Fourth Amendment exclusionary rule created by *United States* v. *Leon*, 468 U. S. 897 (1984). In *Leon*, the Court held that physical evidence seized by police officers reasonably relying upon a warrant issued by a detached and neutral magistrate is admissible in the prosecution's case in chief, even though a reviewing court has subsequently determined that the warrant was defective or that the officers failed to demonstrate when applying for the warrant that there was probable cause to conduct the search. The Court justified its holding to a large extent on the special protective role that a neutral and detached magistrate plays in safeguarding the Fourth Amendment right against unreasonable searches and seizures, *id.*, at 913–917. In fact, the Court indicated that suppression of evidence is appropriate where "the magistrate [has] abandoned his detached and neutral role," *id.*, at 926. In my dissent, I warned that creation of a good-faith exception implicitly tells magistrates that they need not take much care in reviewing warrant applications, since their mistakes will have virtually no consequence, *id.*, at 956. Today the Court tacitly informs magistrates that not only need they not worry about mistakes, they also need no longer be neutral and detached in their review of supporting affidavits. The combined message of *Leon* and the Court's refusal to grant certiorari in this case is that the

police may rely on the magistrates and the magistrates may rely on the police. On whom may citizens rely to protect their Fourth Amendment rights?

I would grant certiorari and summarily reverse, or at least set the case for oral argument.

No. 85–35. GREBER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 68.

JUSTICE WHITE, dissenting.

Petitioner Greber was convicted in United States District Court on several counts of making false statements "in any matter within the jurisdiction of any department or agency of the United States." See 18 U. S. C. § 1001. In connection with these convictions, the District Court refused to submit the question of the materiality of Greber's statements to the jury, holding that materiality was a question of law to be decided by the court. The United States Court of Appeals for the Third Circuit affirmed the convictions and upheld the District Court's determination that materiality was a question of law. See 760 F. 2d 68, 72–73 (1985). Other Circuits have also concluded that materiality is a question of law. See, *e. g.*, *Nilson Van & Storage Co.* v. *Marsh*, 755 F. 2d 362, 367 (CA4), cert. denied, *ante*, p. 818; *United States* v. *Abadi*, 706 F. 2d 178, 180 (CA6), cert. denied, 464 U. S. 821 (1983). Two Circuits, however, have held that materiality under § 1001 is a question of fact and should thus be submitted to the jury. See *United States* v. *Irwin*, 654 F. 2d 671, 677, n. 8 (CA10 1981); *United States* v. *Valdez*, 594 F. 2d 725, 729 (CA9 1979). I would grant certiorari to resolve this conflict.

No. 85–46. ROEDER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 688 S. W. 2d 856.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the judgment below so that the court below can determine the sentence, other than death, that may be appropriate.

No. 85–58. MORAN, AS FATHER TO HIS MINOR SON, MORAN, ET AL. *v.* PIMA COUNTY ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 145 Ariz. 183, 700 P. 2d 881.

JUSTICE WHITE, dissenting.

Petitioner Moran filed this suit in Pima County Superior Court against respondents Pima County, Arizona, and various of its law enforcement officials. In his complaint, Moran alleged unlawful arrest, detention, and excessive use of force and sought relief under 42 U. S. C. § 1981 and § 1983. The case was tried to a jury, and the jury awarded Moran $500 in damages. The Superior Court summarily denied Moran's motion for attorney's fees under 42 U. S. C. § 1988. The Arizona Court of Appeals affirmed this denial, concluding in part that the "moral victory" that the verdict represented was not sufficient to warrant an award of attorney's fees under § 1988. See 145 Ariz. 183, 184, 700 P. 2d 881, 882 (1985). The Supreme Court of Arizona denied review.

The Arizona Court of Appeals' decision in this case is in accord with Circuit decisions that have held that a plaintiff receiving only nominal damages is not truly prevailing and is therefore not entitled to attorney's fees. See, *e. g.*, *Fast* v. *School Dist. of City of Ladue*, 712 F. 2d 379, 380 (CA8 1983); *Huntley* v. *Community School Board of Brooklyn*, 579 F. 2d 738, 742 (CA2 1978). This conclusion, however, has been rejected by other Circuits. See *Skoda* v. *Fontani*, 646 F. 2d 1193, 1194 (CA7 1981) *(per curiam)*; *Burt* v. *Abel*, 585 F. 2d 613, 617–618 (CA4 1978). I would grant certiorari to resolve this conflict.

No. 85–100. MICHIGAN *v.* BLACKBURN. Ct. App. Mich. Certiorari denied. THE CHIEF JUSTICE and JUSTICE WHITE would grant certiorari. Reported below: 135 Mich. App. 509, 354 N. W. 2d 807.

No. 85–5448. WHITLEY *v.* BAIR, WARDEN. Sup. Ct. Va. Certiorari denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 84-6799. CARRIGAN *v.* LASHLEY, *ante*, p. 834;

No. 84-6806. GORMONG *v.* LOCAL 613, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL., *ante*, p. 834;

No. 84-6824. SPAN *v.* DELAINE, *ante*, p. 835;

No. 84-6889. OWENS *v.* FREEMAN, SUPERINTENDENT, PENNSYLVANIA CORRECTIONAL INSTITUTION AT CAMP HILL, ET AL., *ante*, p. 838;

No. 84-6954. CAMPBELL *v.* OHIO DEPARTMENT OF JUSTICE ET AL., *ante*, p. 840;

No. 84-7007. BROWN *v.* UNITED STATES, *ante*, p. 842;

No. 85-5003. IN RE WHALEY, *ante*, p. 814;

No. 85-5144. OWENS *v.* UNITED STATES, *ante*, p. 857;

No. 85-5202. BROWN *v.* ZANT, *ante*, p. 860;

No. 85-5211. KELLEY *v.* UNITED STATES, *ante*, p. 860;

No. 85-5220. PINKERTON *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 865;

No. 85-5245. FOSTER *v.* SMITH ET AL., *ante*, p. 861; and

No. 85-5268. DISILVESTRO *v.* UNITED STATES, *ante*, p. 862. Petitions for rehearing denied.

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Appeals Dismissed

No. 85-216. ROA ET AL., INDIVIDUALLY AND AS GUARDIANS AD LITEM FOR ROA *v.* LODI MEDICAL GROUP, INC., ET AL. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 37 Cal. 3d 920, 695 P. 2d 164.

No. 85-342. PAINTER *v.* ALASKA. Appeal from Ct. App. Alaska dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 695 P. 2d 241.

No. 85-5529. PRENZLER *v.* DEAN FORWARDING CO., INC. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-5531. MEYER *v.* OREGON. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers whereon

the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 73 Ore. App. 344, 698 P. 2d 1054.

No. 85–522. ALLIED BOND & COLLECTION AGENCY *v.* MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. JUSTICE POWELL and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. Reported below: 394 Mass. 608, 476 N. E. 2d 955.

Certiorari Granted—Vacated and Remanded

No. 85–5113. MINOR *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Dowling* v. *United States*, 473 U. S. 207 (1985). Reported below: 756 F. 2d 731.

Miscellaneous Orders

No. A–323 (84–1244). DAVIS ET AL. *v.* BANDEMER ET AL. D. C. S. D. Ind. [Probable jurisdiction noted, 470 U. S. 1083.] Appellants having reapplied for a stay in this case pending its final resolution in this Court and it appearing that all of the requirements for the issuance of a stay are satisfied, the application is granted and it is ordered that the judgment of the District Court for the Southern District of Indiana is stayed until further order of the Court.

No. A–355. CHEESEMAN ET AL. *v.* UNITED STATES. Application to vacate a stay entered by the United States Court of Appeals for the Second Circuit, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D–504. IN RE DISBARMENT OF HOWARD. Disbarment entered. [For earlier order herein, see 472 U. S. 1024.]

No. D–515. IN RE DISBARMENT OF KANTER. Disbarment entered. [For earlier order herein, see 473 U. S. 931.]

No. D–516. IN RE DISBARMENT OF MCKABA. Disbarment entered. [For earlier order herein, see 473 U. S. 931.]

No. D–531. IN RE DISBARMENT OF CAMACHO. It is ordered that Francisco M. Camacho, of Mukwonago, Wis., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–532. IN RE DISBARMENT OF HEFNER. It is ordered that Stephen Frank Hefner, of Sherman, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 84–1744. HENDERSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, *ante*, p. 900.] Motion of petitioner Ruth Freedman for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Alex Reisman, Esquire, of San Francisco, Cal., be appointed to serve as counsel for petitioner Ruth Freedman in this case.

No. 84–1922. UNITED STATES *v.* KOECHER. C. A. 2d Cir. [Certiorari granted, *ante*, p. 815.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 85–54. LIBRARY OF CONGRESS ET AL. *v.* SHAW. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 815.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 85–289. UNITED STATES DEPARTMENT OF TRANSPORTATION ET AL. *v.* PARALYZED VETERANS OF AMERICA ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 918.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 84–1993. HYDE *v.* VAN WORMER ET AL., *ante*, p. 827. Motion of federal respondents for award of damages granted, and damages awarded to federal respondents only in the amount of $500 pursuant to this Court's Rule 49.2. Motion of respondents Inland Steel Co. et al. for award of damages granted, and damages in the amount of $500 awarded pursuant to this Court's Rule 49.2. Request of Inland Steel Co. et al. for award of double costs pursuant to Rule 50.7 denied. Motion of petitioner for award of costs and fees denied. JUSTICE BLACKMUN dissents from the awards of damages.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, dissenting from award of damages.

This Court's Rule 49.2 states that "[w]hen an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages." The Rule sets

no standards for determining when a petition for certiorari is "frivolous," or the amount of damages which may be "appropriate." Absent such criteria, I believe that any award of damages imposed by the Court can only be arbitrary. In this case, the Court has decided to award respondents $500 apiece in damages. It makes no effort to justify this award, or to explain how it arrived at the $500 figure. For these reasons, I dissent from the award of damages.

No. 85–552. SAKAMOTO ET AL. *v.* DUTY FREE SHOPPERS, LTD., ET AL. C. A. 9th Cir.; and

No. 85–616. SHARON STEEL CORP. *v.* CITY OF FAIRMONT, WEST VIRGINIA, ET AL. Appeal from Sup. Ct. App. W. Va. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 85–556. KEMP, WARDEN *v.* DRAKE. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 85–5487. SMITH *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. [Certiorari granted, *ante*, p. 918.] Motion for appointment of counsel granted, and it is ordered that J. Lloyd Snook III, Esquire, of Charlottesville, Va., be appointed to serve as counsel for petitioner in this case.

No. 85–5563. FONDEL *v.* FORD MOTOR CO. ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 9, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85–525. IN RE FRYAR; and

No. 85–5504. IN RE SCHMID. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 85-250. BLOCK, SECRETARY OF AGRICULTURE *v.* CASTILLO ET AL. Appeal from D. C. S. D. Tex. Probable jurisdiction noted.

Certiorari Granted

No. 85-546. UNITED STATES *v.* MOTTAZ. C. A. 8th Cir. Certiorari granted. Reported below: 753 F. 2d 71.

Certiorari Denied. (See also Nos. 85-342, 85-5529, and 85-5531, *supra.*)

No. 84-1894. SADE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 84-6721. JOHNSON ET AL. *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 84-6817. LEHMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 756 F. 2d 725.

No. 84-6919. MILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 570.

No. 85-34. CAUBLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 757 F. 2d 282.

No. 85-51. RANDLES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 147.

No. 85-69. MILBURN ET AL. *v.* UNITED STATES; and
No. 85-5232. MILBURN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 759 F. 2d 1316.

No. 85-136. MULVEY *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 259.

No. 85-157. JACKSON, AKA ROE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 757 F. 2d 1486.

No. 85-164. WASHINGTON ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 759 F. 2d 1353.

No. 85-206. PASCARELLA *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 85-316. OWEN *v.* JUDGE OF THE COUNTY COURT, SCHENECTADY COUNTY, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 65 N. Y. 2d 658, 481 N. E. 2d 243.

No. 85–361. BYKOFSKY *v.* HESS ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 65 N. Y. 2d 730, 481 N. E. 2d 569.

No. 85–507. COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY *v.* LOS ANGELES COUNTY EMPLOYEES ASSN., LOCAL 660, ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 38 Cal. 3d 564, 699 P. 2d 835.

No. 85–517. MILLER ET AL. *v.* CITY OF LOS ANGELES. C. A. 9th Cir. Certiorari denied. Reported below: 755 F. 2d 1390.

No. 85–523. ARANGO ET AL. *v.* COMPANIA DOMINICANA DE AVIACION. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 1527.

No. 85–524. TUDOR *v.* GLAESMAN ET UX. Ct. App. Kan. Certiorari denied. Reported below: 10 Kan. App. 2d xxxviii.

No. 85–533. SILENT HOIST & CRANE CO., INC. *v.* DIRECTOR, DIVISION OF TAXATION. Sup. Ct. N. J. Certiorari denied. Reported below: 100 N. J. 1, 494 A. 2d 775.

No. 85–540. COLE ET AL. *v.* MCEVERS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 925.

No. 85–544. SUBURBAN FORD, INC., ET AL. *v.* FORD MOTOR CREDIT CO. Sup. Ct. Kan. Certiorari denied. Reported below: 237 Kan. 195, 699 P. 2d 992.

No. 85–545. WYRICK, WARDEN, ET AL. *v.* PARTON. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 2d 336.

No. 85–548. AHO *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 166 Cal. App. 3d 984, 212 Cal. Rptr. 686.

No. 85–566. ANDERSEN ET AL. *v.* CIBA-GEIGY CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 759 F. 2d 1518.

No. 85–575. BARA ET AL. *v.* AURORA CIVIL SERVICE COMMISSION OF THE CITY OF AURORA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1166.

No. 85–578. ROYCE INTERNATIONAL BROADCASTING CO. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 44, 762 F. 2d 138.

No. 85–651. LEPMAN *v.* NEW JERSEY RACING COMMISSION. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85–676. BOCK *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 760 F. 2d 253.

No. 85–679. WENDOLKOWSKI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 765 F. 2d 253.

No. 85–5048. CHILDRESS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 929.

No. 85–5091. MASIELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 909.

No. 85–5115. JORDAN *v.* UNITED STATES DEPARTMENT OF STATE. C. A. D. C. Cir. Certiorari denied. Reported below: 245 U. S. App. D. C. 234, 759 F. 2d 960.

No. 85–5154. GOODLATAW, PERSONAL REPRESENTATIVE FOR THE ESTATE OF GOODLATAW *v.* ALASKA ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 698 P. 2d 1190.

No. 85–5216. SMITH *v.* MASCHNER, DIRECTOR, KANSAS STATE PENITENTIARY. Sup. Ct. Kan. Certiorari denied. Reported below: 237 Kan. 365, 699 P. 2d 521.

No. 85–5286. DANIELS *v.* PAPASAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 755 F. 2d 171.

No. 85–5288. QUAN YOUNG ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 450.

No. 85–5299. CROOKS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 766 F. 2d 7.

No. 85–5418. ELMORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 935.

No. 85–5471. HOWELL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 62 Md. App. 278, 489 A. 2d 55.

No. 85–5489. SEARCY *v.* GREER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 906.

No. 85–5494. THORNE *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 333 S. E. 2d 817.

No. 85–5495. McGLORY *v.* YOKA. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85–5497. ABBITT *v.* SAIED, JUDGE, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85–5498. HUNTER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 106 Ill. 2d 557.

No. 85–5508. HADDIX *v.* OHIO LIQUOR CONTROL COMMISSION. Sup. Ct. Ohio. Certiorari denied.

No. 85–5510. BURTON *v.* WILSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 760 F. 2d 273.

No. 85–5511. BURTON *v.* SMITH. C. A. 8th Cir. Certiorari denied.

No. 85–5514. CUNNINGHAM *v.* SHAFER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 1169.

No. 85–5518. FLEMING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 85–5519. GLICK *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 769 F. 2d 471.

No. 85–5521. JEFFERSON *v.* MUNCY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 912.

No. 85–5528. ZIMMERMAN *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 85–5556. IN RE BURNLEY. C. A. 4th Cir. Certiorari denied. Reported below: 774 F. 2d 1154.

No. 85–5569. TUBBS *v.* McCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85–5577. ROTHSCHILD *v.* UNITED STATES SUPREME COURT ET AL. C. A. 11th Cir. Certiorari denied.

No. 85–5578. MARSH *v.* OREGON. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 912.

No. 85–5581. KOLMAN *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1049.

No. 85-5587. JEMMOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 914.

No. 85-5588. MAYS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 1295.

No. 85-5596. ANDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 152.

No. 85-5598. HAKIM *v.* WOLVERINE PACKING CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 145.

No. 85-5604. CLARK *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 286 S. C. 432, 334 S. E. 2d 121.

No. 85-5631. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 925.

No. 85-5632. CARTER *v.* SPANIOL, CLERK OF THE UNITED STATES SUPREME COURT. C. A. D. C. Cir. Certiorari denied.

No. 85-5639. GRANT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 909.

No. 85-5644. POLI *v.* MAZURKIEWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW. C. A. 3d Cir. Certiorari denied.

No. 84-6843. SPAULDING *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari.

No. 85-56. CONNOR *v.* UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS. C. A. Fed. Cir. Motion of petitioner to strike brief in opposition denied. Certiorari denied. Reported below: 765 F. 2d 160.

No. 85-188. KEMP, WARDEN *v.* BLAKE. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 523.

JUSTICE WHITE, dissenting.

This case presents the question whether, in a habeas corpus proceeding presenting multiple claims for relief, an appellate court has jurisdiction to review an order of the district court without disposing of all of petitioner's claims. In his habeas petition to

the District Court, respondent presented 59 constitutional claims. The District Court found that three of these claims had merit and granted the writ, but expressly refused to rule on the remaining claims. *Blake* v. *Zant*, 513 F. Supp. 772 (SD Ga. 1981). On appeal, the Eleventh Circuit originally held that, because the District Court's order did not finally determine all of the claims presented in the habeas petition, under Federal Rule of Civil Procedure 54(b),[1] there was no final judgment, and therefore, the court was without jurisdiction to consider the appeal under 28 U. S. C. § 1291.[2] *Blake* v. *Zant*, 737 F. 2d 925, 928 (1984). On *sua sponte* reconsideration, however, the court determined that a district court order granting a writ of habeas corpus is a final judgment within the meaning of § 1291, regardless of the district court's refusal to consider the remainder of petitioner's claims. 758 F. 2d 523, 524–525 (1985).

This later decision of the Eleventh Circuit conflicts with the practice of the Eighth Circuit. That court has held that, when a district court grants habeas relief to a petitioner on some but not all of the claims presented for consideration, the court of appeals does not have jurisdiction to review the trial court's decision unless its order also finally disposes of the remainder of petitioner's claims. *Stewart* v. *Bishop*, 403 F. 2d 674, 679–680 (1968). See also *Gray* v. *Swenson*, 430 F. 2d 9, 11 (CA8 1970) (Rule 54(b) applies to prohibit appeals when fewer than all habeas claims are

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[1] Rule 54(b) provides as follows:

"(b) *Judgment Upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

[2] Section 1291 provides, in pertinent part, as follows:

"The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

finally determined by the district court's order, but finding all claims to have been decided). Given this direct conflict among the Courts of Appeals, I would grant certiorari in this case.

No. 85-242. WEST CENTRAL COOPERATIVE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE O'CONNOR would grant certiorari. Reported below: 758 F. 2d 1269.

No. 85-5561. EAST *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 702 S. W. 2d 606.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 84-1924. CITY OF POMPANO BEACH *v.* CAPALBO, *ante*, p. 824;

No. 84-6589. BROFFORD *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, *ante*, p. 872;

No. 84-6947. CLARK *v.* BYRON JACKSON PUMP CO. ET AL., *ante*, p. 840;

No. 84-6975. ALDERMAN *v.* GEORGIA, *ante*, p. 911;

No. 84-6984. LIGHTSEY *v.* OKLAHOMA, *ante*, p. 841;

No. 85-5006. SOMMER *v.* COUNTY OF SUFFOLK ET AL., *ante*, p. 852;

No. 85-5080. SRUBAR ET AL. *v.* DEPARTMENT OF THE TREASURY ET AL., *ante*, p. 855;

No. 85-5083. JOHNSON *v.* NEW YORK STATE COURT OFFICERS ASSN. ET AL., *ante*, p. 855;

No. 85-5089. BAD FOOT *v.* BOLT, SHERIFF, ET AL., *ante*, p. 855;

No. 85-5148. BOWDEN *v.* IDAHO DEPARTMENT OF HEALTH AND WELFARE, *ante*, p. 805;

No. 85-5161. WHITTLESEY *v.* MARYLAND, *ante*, p. 858;

No. 85-5188. IDLEBIRD *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL., *ante*, p. 859; and

No. 85-5206. STREICH *v.* UNITED STATES, *ante*, p. 860. Petitions for rehearing denied.

NOVEMBER 22, 1985

Dismissal Under Rule 53

No. 85-180. AMERICAN AIRLINES, INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 743 F. 2d 1114.

NOVEMBER 29, 1985

Dismissal Under Rule 53

No. 84-1832. ROCK *v.* ZINN, JUDGE, SECOND JUDICIAL DISTRICT. Sup. Ct. N. M. Certiorari dismissed under this Court's Rule 53.

DECEMBER 2, 1985

Appeals Dismissed

No. 85-506. ASCANI, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF ASCANI, ET AL. *v.* HUGHES ET AL. Appeal from Ct. App. La., 4th Cir., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 470 So. 2d 207.

No. 85-583. FAHEY *v.* BECKLEY ET AL. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-551. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL. *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction.

Certiorari Granted—Vacated and Remanded

No. 84-1815. HOFFMAN *v.* ETI-QUETTE ASSAF LTD. ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479 (1985). Reported below: 760 F. 2d 253.

No. 85-5496. TUCKER *v.* KEMP, WARDEN. C. A. 11th Cir. Motions of National Legal Aid and Defender Association et al. and Vivian O. Berger et al. for leave to file briefs as *amici curiae*

granted. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). Reported below: 762 F. 2d 1480.

No. 85-5503. ROGERS *v.* OHIO. Sup. Ct. Ohio. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). Reported below: 17 Ohio St. 3d 174, 478 N. E. 2d 984.

Miscellaneous Orders

No. D-511. IN RE DISBARMENT OF STOCK. Disbarment entered. [For earlier order herein, see 473 U. S. 930.]

No. D-533. IN RE DISBARMENT OF EVANS. It is ordered that Levi W. Evans III, of Philadelphia, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 84-773. BENDER ET AL. *v.* WILLIAMSPORT AREA SCHOOL DISTRICT ET AL. C. A. 3d Cir. [Certiorari granted, 469 U. S. 1206.] Motion of respondents for leave to file a supplemental brief after argument granted.

No. 84-871. LOUISIANA PUBLIC SERVICE COMMISSION *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. [Probable jurisdiction postponed, 472 U. S. 1025];

No. 84-889. CALIFORNIA ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. [Certiorari granted, 472 U. S. 1025];

No. 84-1054. PUBLIC UTILITIES COMMISSION OF OHIO ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. [Certiorari granted, 472 U. S. 1025]; and

No. 84-1069. FLORIDA PUBLIC SERVICE COMMISSION *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. [Certiorari granted, 472 U. S. 1026.] Motion of the Solicitor General for divided argument granted. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 84-902. WARDAIR CANADA INC. *v.* FLORIDA DEPARTMENT OF REVENUE. Sup. Ct. Fla. [Probable jurisdiction noted,

ante, p. 943.] Motion of appellant to dispense with printing the joint appendix granted.

No. 84–6646. TURNER *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. [Certiorari granted, 471 U. S. 1098.] Further consideration of motion of petitioner to strike ex parte affidavit is deferred to the hearing of the case on the merits.

No. 85–202. OFFSHORE LOGISTICS, INC., ET AL. *v.* TALLENTIRE ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 816.] Motion of Sonat Offshore Drilling, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 85–615. CALIFORNIA DEPARTMENT OF TRANSPORTATION *v.* NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., ET AL.; and

No. 85–639. DESERT OUTDOOR ADVERTISING, INC. *v.* NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC. Sup. Ct. Cal. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 85–5189. MCLAUGHLIN *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, *ante*, p. 944.] Motion for appointment of counsel granted, and it is ordered that Stephen J. Cribari, Esquire, of Baltimore, Md., be appointed to serve as counsel for petitioner in this case.

No. 85–5688. JONES *v.* AMERICAN POSTAL WORKERS UNION ET AL. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 23, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85–5541. IN RE BETKA. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 85–521. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT ET AL. Appeal from D. C. E. D. Cal. Probable jurisdiction noted. Reported below: 613 F. Supp. 558.

Certiorari Granted

No. 85–298. CONNOLLY *v.* BURT. C. A. 10th Cir. Certiorari granted. Reported below: 757 F. 2d 242.

No. 85–499. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL. *v.* ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 756 F. 2d 1087.

No. 85–554. UNITED STATES *v.* HUGHES PROPERTIES, INC. C. A. Fed. Cir. Certiorari granted. Reported below: 760 F. 2d 1292.

No. 85–588. UNIVERSITY OF TENNESSEE ET AL. *v.* ELLIOTT. C. A. 6th Cir. Certiorari granted. Reported below: 766 F. 2d 982.

No. 85–619. MERRELL DOW PHARMACEUTICALS INC. *v.* THOMPSON ET AL., AS NEXT FRIENDS AND GUARDIANS OF THOMPSON, ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 766 F. 2d 1005.

No. 85–599. UNITED STATES *v.* AMERICAN BAR ENDOWMENT ET AL. C. A. Fed. Cir. Certiorari granted. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 761 F. 2d 1573.

Certiorari Denied. (See also Nos. 85–506 and 85–583, *supra.*)

No. 84–6717. HOLSEY *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 302 Md. 130, 486 A. 2d 173.

No. 84–6760. EDWARDS *v.* HARRIS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1007.

No. 84–6841. SPIESS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 758 F. 2d 1201.

No. 84–6892. WILLIAMS, AKA ANTHONY, ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 649.

No. 85–47. WHITT, EXECUTOR OF THE ESTATE OF WHITT *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 751 F. 2d 1548.

No. 85–109. DEAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 150.

No. 85–175. GARWOOD *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 20 M. J. 148.

No. 85–178. DE LE PUENTE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 313.

No. 85–179. CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION *v.* BONNEVILLE POWER ADMINISTRATION. C. A. 9th Cir. Certiorari denied. Reported below: 754 F. 2d 1470.

No. 85–199. DELLINGER, INC., ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 760 F. 2d 527.

No. 85–220. BURLINGTON NORTHERN RAILROAD CO. *v.* CHERNER, JUDGE OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 470 So. 2d 1094.

No. 85–241. MCSURELY ET AL. *v.* MCCLELLAN ET AL.; and
No. 85–420. BRICK *v.* MCSURELY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 243 U. S. App. D. C. 270, 753 F. 2d 88.

No. 85–260. MANHATTAN INDUSTRIES, INC. *v.* GOLDSTEIN. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 1435.

No. 85–333. MODINE MANUFACTURING CO. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1073.

No. 85–350. FARLEY *v.* ROBERTS. Ct. App. Tex., 6th Sup. Jud. Dist. Certiorari denied.

No. 85–362. CALIFORNIA STATE LANDS COMMISSION *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 752 F. 2d 393.

No. 85–398. JONES ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 766 F. 2d 994.

No. 85–457. WESTBROOK *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 286 Ark. 192, 691 S. W. 2d 123.

No. 85–490. JOSEPH ET AL. *v.* NEW ORLEANS ELECTRICAL PENSION AND RETIREMENT PLAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 754 F. 2d 628.

No. 85–503. SPARROW *v.* HAJIMAHOLIS ET AL. Ct. App. D. C. Certiorari denied.

No. 85–527. FAITH CENTER, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 43, 762 F. 2d 137.

No. 85–571. SIMPLOT ET AL. *v.* STROBL. C. A. 2d Cir. Certiorari denied. Reported below: 768 F. 2d 22.

No. 85–572. RINGSBY TRUCK LINES, INC., ET AL. *v.* TRUCKING EMPLOYERS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 934.

No. 85–579. WARREN *v.* LOCAL 1759, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES. C. A. 11th Cir. Certiorari denied. Reported below: 764 F. 2d 1395.

No. 85–585. DISTRICT 2, UNITED MINE WORKERS OF AMERICA, ET AL. *v.* HELEN MINING CO. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 1155.

No. 85–589. HALL ET AL. *v.* SIMCOX ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 766 F. 2d 1171.

No. 85–590. MAZZELLA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 768 F. 2d 235.

No. 85–594. ON-DECK, INC. *v.* ROSTAD ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 372 N. W. 2d 717.

No. 85–600. SLOAN ET AL. *v.* HICKS, TRUSTEE IN BANKRUPTCY OF BECKNELL & CRACE COAL CO., INC., BANKRUPT. C. A. 6th Cir. Certiorari denied. Reported below: 761 F. 2d 319.

No. 85–606. DORAN *v.* TRAVELERS INDEMNITY CO. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1082.

No. 85–610. PIAROWSKI *v.* ILLINOIS COMMUNITY COLLEGE DISTRICT 515, PRAIRIE STATE COLLEGE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 759 F. 2d 625.

No. 85–611. MCQUAY ET AL. *v.* CITY OF JUNCTION CITY, KANSAS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85–612. PROGRAM ENGINEERING, INC. *v.* CALIFORNIA JOCKEY CLUB. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 149.

No. 85–617. KULLBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 150.

No. 85–618. MILLER ET AL. *v.* HOGG BROTHERS PARTNERSHIP ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 929.

No. 85–624. CARBALAN *v.* VAUGHN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 760 F. 2d 662.

No. 85–627. FRYE *v.* UNITED STEELWORKERS OF AMERICA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 1216.

No. 85–628. BIPPUS ET AL. *v.* LOCAL 100 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 165.

No. 85–629. CUNNINGHAM *v.* HOUSING AUTHORITY OF THE CITY OF OPELOUSAS, DBA OPELOUSAS HOUSING AUTHORITY. C. A. 5th Cir. Certiorari denied. Reported below: 764 F. 2d 1097.

No. 85–630. GRIMMER ET AL. *v.* HARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 760 F. 2d 1158.

No. 85–644. NAZARIAN *v.* NAZARIAN. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85–647. MANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 915.

No. 85–648. FULLER *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 767 F. 2d 937.

No. 85–649. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, LOCAL 1414, ET AL. *v.* WARD. C. A. 11th Cir. Certiorari denied.

No. 85–650. MCCORSTIN *v.* UNITED STATES STEEL CORP. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 152.

No. 85–661. RUSSELL ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 2d 161.

No. 85–662. TEXAS *v.* UNITED STATES DEPARTMENT OF ENERGY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 764 F. 2d 278.

No. 85–687. KELLY *v.* WHITING, JUDGE, COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 17 Ohio St. 3d 91, 477 N. E. 2d 1123, and 17 Ohio St. 3d 254, 479 N. E. 2d 254.

No. 85–689. MUTH *v.* SHOWERS. Super. Ct. Pa. Certiorari denied. Reported below: 343 Pa. Super. 628, 494 A. 2d 492.

No. 85–696. HELFRICHT *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85–699. DESANTIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 150.

No. 85–707. CITY OF PHILADELPHIA *v.* BOROUGH OF GLASSBORO ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 100 N. J. 134, 495 A. 2d 49.

No. 85–710. RANDELL ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 35.

No. 85–719. BORNTRAGER *v.* STEVAS, FORMER CLERK OF SUPREME COURT OF UNITED STATES, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 772 F. 2d 419.

No. 85–722. KAPRELIAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 893.

No. 85-726. BARLOW ET AL. *v.* BREWERY WORKERS LOCAL UNION NO. 1010 ET AL. C. A. 4th Cir. Certiorari denied.

No. 85-5064. STURM *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 85-5065. MATECKI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 150.

No. 85-5084. ROSSER-EL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-5106. FREDERICK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 925.

No. 85-5121. FREELAND *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 152.

No. 85-5182. LAMP *v.* FARRIER. C. A. 8th Cir. Certiorari denied. Reported below: 763 F. 2d 994.

No. 85-5209. KLEIN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 20 M. J. 26.

No. 85-5222. MALLOY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 979.

No. 85-5325. REMIGIO, AKA CUERVO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 767 F. 2d 730.

No. 85-5343. GORDON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 111 App. Div. 2d 409, 489 N. Y. S. 2d 608.

No. 85-5349. PRAYLOW *v.* MARTIN, ASSISTANT REGIONAL ADMINISTRATOR, MIDLANDS CORRECTIONAL REGION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 761 F. 2d 179.

No. 85-5384. GAERTNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 763 F. 2d 787.

No. 85-5468. RODMAN *v.* MCMACKIN, SUPERINTENDENT, HOCKING CORRECTIONAL FACILITY. C. A. D. C. Cir. Certiorari denied.

No. 85-5475. HUGHES *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. Reported below: 494 A. 2d 85.

No. 85–5509. CORBETT *v.* MINTZES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 905.

No. 85–5524. MCCORMICK *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 770 F. 2d 163.

No. 85–5525. VEALE ET AL. *v.* VEALE ET AL. C. A. 1st Cir. Certiorari denied.

No. 85–5527. DAVIS *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 85–5530. CAREY *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 440.

No. 85–5536. GANS *v.* MUNDY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 338.

No. 85–5539. BUCHANAN *v.* REES, SUPERINTENDENT, KENTUCKY STATE REFORMATORY. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 905.

No. 85–5540. ABDUL-RAHIM *v.* HARDCASTLE, SHERIFF. C. A. 11th Cir. Certiorari denied.

No. 85–5544. WELCH *v.* OHIO; and

No. 85–5545. PATTERSON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 18 Ohio St. 3d 88, 480 N. E. 2d 384.

No. 85–5547. SPELLMAN *v.* INTEGON GENERAL INSURANCE CORP. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 913.

No. 85–5550. ADAMS *v.* BRIERTON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 2d 546.

No. 85–5560. GANNON *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 85–5562. ALMON *v.* SHARP ET AL. Sup. Ct. Ala. Certiorari denied.

No. 85–5566. LOVELACE *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 765 F. 2d 742.

No. 85–5568. MCLAURIN *v.* SYRACUSE UNIVERSITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 157.

No. 85–5570. WILLIAMS *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 917.

No. 85–5573. TURNER *v.* NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF SERVICES FOR THE BLIND, ET AL. C. A. 4th Cir. Certiorari denied.

No. 85–5576. WHIGHAM *v.* NEW YORK TELEPHONE. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 37.

No. 85–5583. BURTON *v.* SARGENT, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 85–5584. BURTON *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 929.

No. 85–5585. JONES *v.* GREER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1167.

No. 85–5590. MORRIS *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 772 F. 2d 902.

No. 85–5592. RIDLEY *v.* GOLDMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 926.

No. 85–5593. ISADORE *v.* KINCHELOE, SUPERINTENDENT, WASHINGTON STATE REFORMATORY. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 932.

No. 85–5601. BURNLEY *v.* SUPERINTENDENT OF THE CAPRON CORRECTIONAL UNIT. Sup. Ct. Va. Certiorari denied.

No. 85–5602. SNOWDEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 2d 393.

No. 85–5603. PHELPS *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 1410.

No. 85–5605. A. E. R., A CHILD *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 464 So. 2d 152.

No. 85–5611. WOOD *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 341 Pa. Super. 622, 491 A. 2d 923.

No. 85–5612. SHAW *v.* HUNT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 913.

No. 85–5613. PRINCE *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 772 F. 2d 902.

No. 85–5614. MIDWIFE ET AL. *v.* DIRECTOR, STATE DEPARTMENT OF SOCIAL SERVICES. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85–5616. CUSHING-GALE *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 85–5618. EVATT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 169.

No. 85–5629. BURDEN *v.* BOLGER, POSTMASTER GENERAL OF THE UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1167.

No. 85–5630. GHOLSTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 165.

No. 85–5638. BUSH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 765 F. 2d 683.

No. 85–5641. BERTONIERE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 916.

No. 85–5645. PETTIT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 2d 1351.

No. 85–5646. SWICEGOOD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 767 F. 2d 936.

No. 85–5647. WILSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 915.

No. 85–5652. VERDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 772 F. 2d 902.

No. 85–5654. STERLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 764 F. 2d 530.

No. 85–5655. PATTERSON *v.* BUENA VISTA DISTRIBUTION CO. ET AL. C. A. 11th Cir. Certiorari denied.

No. 85–5669. MOFFITT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85–5672. HART *v.* RISLEY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 911.

No. 85–5674. VIDO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 37.

No. 85–5677. EISSA *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 485 A. 2d 610.

No. 85–5692. MURIEL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 36.

No. 85–5734. SIMON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 524.

No. 85–5740. ADAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 771 F. 2d 783.

No. 85–5743. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1167.

No. 85–5745. HINKE *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85–331. ISRAEL, WARDEN *v.* WALBERG. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 766 F. 2d 1071.

No. 85–395. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* COLLINS. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 754 F. 2d 258.

No. 85–500. CARROLL ET AL. *v.* ALBERTS ET AL. Sup. Jud. Ct. Mass. Motion of General Council on Finance and Administration of the United Methodist Church et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. JUSTICE BRENNAN

and JUSTICE WHITE would grant certiorari. Reported below: 395 Mass. 59, 479 N. E. 2d 113.

No. 85–609. WANSONG *v.* WANSONG. Sup. Jud. Ct. Mass. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 395 Mass. 154, 478 N. E. 2d 1270.

No. 85–5606. DAVIS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 477 N. E. 2d 889.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 84–1534. LUTJEHARMS, COMMISSIONER OF EDUCATION OF NEBRASKA, ET AL. *v.* ROSE, AS NEXT FRIEND OF ROSE, *ante*, p. 817;

No. 84–1559. UNITED VAN LINES, INC. *v.* HUNTER ET AL., *ante*, p. 863;

No. 84–1666. CUMMINGS *v.* UNITED STATES ET AL., *ante*, p. 817;

No. 84–1759. T. G. & Y. STORES, INC. *v.* LUSBY ET AL., *ante*, p. 818;

No. 84–1845. SORENSEN *v.* FITZGERALD, TRUSTEE, *ante*, p. 918;

No. 84–1847. LANDES *v.* DEPARTMENT OF JUSTICE, *ante*, p. 821;

No. 84–1869. MARCONE *v.* PENTHOUSE INTERNATIONAL, LTD., *ante*, p. 864;

No. 84–1926. REID ET AL. *v.* GHOLSON ET AL., *ante*, p. 824;

No. 84–1940. DOW *v.* UNITED VAN LINES ET AL., *ante*, p. 825;

No. 84–1976. IN RE WALTON, *ante*, p. 814;

No. 84–2036. EL SHAHAWY *v.* SARASOTA COUNTY PUBLIC HOSPITAL BOARD, *ante*, p. 829;

No. 84–6768. ZLOMKE *v.* FLYING TIGER LINE, INC., ET AL., *ante*, p. 833; and

No. 84–6771. ROACH *v.* MARTIN, WARDEN, ET AL., *ante*, p. 865. Petitions for rehearing denied.

No. 84–6818. COOMBS *v.* MCGARRY ET AL., *ante*, p. 835;
No. 84–6823. WALKER *v.* GEORGIA, *ante*, p. 865;
No. 84–6832. RUCKER *v.* CITY OF ST. LOUIS ET AL., *ante*, p. 804;
No. 84–6851. BETKA *v.* CITY OF WEST LINN ET AL., *ante*, p. 836;
No. 84–6861. MATHIS *v.* KEMP, WARDEN, *ante*, p. 865;
No. 84–6864. BUSBY *v.* LOUISIANA, *ante*, p. 873;
No. 84–6865. RUCKER *v.* CITY OF ST. LOUIS ET AL., *ante*, p. 805;
No. 84–6866. BREEZE *v.* UNITED STATES, *ante*, p. 875;
No. 84–6922. CAWLEY *v.* BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN ET AL., *ante*, p. 839;
No. 84–6957. AUGUSTYNIAK *v.* KOCH, MAYOR OF THE CITY OF NEW YORK, ET AL., *ante*, p. 840;
No. 84–6958. ROBINSON *v.* COOKE, WARDEN, ET AL., *ante*, p. 840;
No. 84–6970. DAMON *v.* SOUTH CAROLINA, *ante*, p. 865;
No. 84–6990. CARRION *v.* NEW YORK CITY HEALTH AND HOSPITALS CORP. ET AL., *ante*, p. 842;
No. 84–7002. DEL VECCHIO *v.* ILLINOIS, *ante*, p. 883;
No. 85–66. FLORIDA *v.* ARANGO, *ante*, p. 806;
No. 85–218. LUXURY BLANKETS, INC., ET AL. *v.* UNITED STATES, *ante*, p. 849;
No. 85–258. MILLER *v.* INTERNATIONAL TELEPHONE & TELEGRAPH CORP., *ante*, p. 851;
No. 85–5010. MIHAL ET AL. *v.* SARGIS ET AL., *ante*, p. 803;
No. 85–5050. VAN HORN *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, *ante*, p. 854;
No. 85–5067. BOVEE *v.* UNITED STATES, *ante*, p. 854;
No. 85–5174. PHELPS *v.* SOVRAN BANK, *ante*, p. 858;
No. 85–5218. BETKA *v.* SMITH ET AL., *ante*, p. 860;
No. 85–5308. THOMAS *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 935; and
No. 85–5346. IN RE KRAHN, *ante*, p. 899. Petitions for rehearing denied.

DECEMBER 6, 1985

Miscellaneous Order

No. A–440. GUZMON *v.* TEXAS. Application for stay of execution of sentence of death scheduled for Monday, December 9,

1985, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the filing of a petition for writ of certiorari on or before January 6, 1986. In the event the petition for writ of certiorari is filed by said date, this order is to continue pending the disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

DECEMBER 9, 1985

Appeal Dismissed

No. 85-5685. HAMILTON *v.* CALIFORNIA. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question.

Vacated and Remanded After Certiorari Granted

No. 84-1736. HIJAR, SUPERINTENDENT, FEDERAL PRISON CAMP AT BORON, CALIFORNIA *v.* BURRUS. C. A. 9th Cir. [Certiorari granted, *ante*, p. 816.] Judgment vacated and case remanded to the United States District Court for the Northern District of California with instructions to vacate the injunction and to dismiss the cause as moot.

Miscellaneous Orders

No. A-353. ERNEST *v.* UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF ALABAMA ET AL. Application for an injunction or writ of habeas corpus, addressed to JUSTICE REHNQUIST and referred to the Court, denied. Motion to recuse JUSTICE POWELL denied.

No. D-523. IN RE DISBARMENT OF GANTT. Richard Allison Gantt, of Greenville, S. C., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on October 15, 1985 [*ante*, p. 896], is hereby discharged.

No. D-534. IN RE DISBARMENT OF PESNER. It is ordered that David I. Pesner, of Spring Valley, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–535. IN RE DISBARMENT OF ROMANO. It is ordered that Salvatore L. Romano, Jr., of Providence, R. I., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 29, Orig. TEXAS ET AL. *v.* COLORADO. Stipulated motion for dismissal granted and cause dismissed with prejudice. JUSTICE MARSHALL took no part in the consideration or decision of this case. [For earlier order herein, see, *e. g.*, 391 U. S. 901.]

No. 84–1273. REGENTS OF THE UNIVERSITY OF MICHIGAN *v.* EWING. C. A. 6th Cir. [Certiorari granted, 470 U. S. 1083.] Motion of respondent for leave to file a supplemental brief after argument granted.

No. 84–1560. PRESS-ENTERPRISE CO. *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE. Sup. Ct. Cal. [Certiorari granted, *ante*, p. 899.] Motion of respondent to supplement the record and leave to file supplemental appendix granted.

No. 84–1737. UNITED STATES *v.* AMERICAN COLLEGE OF PHYSICIANS. C. A. Fed. Cir. [Certiorari granted, 473 U. S. 904.] Motion of respondent to dismiss writ of certiorari as improvidently granted is denied.

No. 85–21. SQUARE D CO. ET AL. *v.* NIAGARA FRONTIER TARIFF BUREAU, INC., ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 815.] Motions of C. D. Ambrosia Trucking Co., Inc., et al. and Western Fuels Association, Inc., for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–88. PAULUSSEN *v.* HERION. Super. Ct. Pa. [Probable jurisdiction noted, *ante*, p. 899.] Motion of Children's Defense Fund et al. for leave to file a brief as *amici curiae* granted.

No. 85–202. OFFSHORE LOGISTICS, INC., ET AL. *v.* TALLENTIRE ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 816.] Motion of Kenneth G. Engerrand for leave to file a brief as *amicus curiae* granted.

No. 85–406. ARIYOSHI, GOVERNOR OF HAWAII, ET AL. *v.* ROBINSON ET AL. C. A. 9th Cir.; and

No. 85–455. POLO FASHIONS, INC. *v.* STOCK BUYERS INTERNATIONAL, INC., ET AL. C. A. 6th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

Probable Jurisdiction Noted

No. 85–755. REED *v.* CAMPBELL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF RICKER. Appeal from Ct. App. Tex., 8th Sup. Jud. Dist. Probable jurisdiction noted. Reported below: 682 S. W. 2d 697.

No. 85–568. NANTAHALA POWER & LIGHT CO. ET AL. *v.* THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. Appeal from Sup. Ct. N. C. Motions of Edison Electric Institute and United Steelworkers of America, AFL–CIO, Local Union 309, for leave to file briefs as *amici curiae* granted. Probable jurisdiction noted. Reported below: 313 N. C. 614, 332 S. E. 2d 397.

Certiorari Granted

No. 85–664. YOUNG, COMMISSIONER OF FOOD AND DRUG ADMINISTRATION *v.* COMMUNITY NUTRITION INSTITUTE ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 244 U. S. App. D. C. 279, 757 F. 2d 354.

No. 85–530. O'CONNOR ET AL. *v.* ORTEGA. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 764 F. 2d 703.

No. 85–621. COMMODITY FUTURES TRADING COMMISSION *v.* SCHOR ET AL.; and

No. 85–642. CONTICOMMODITY SERVICES, INC. *v.* SCHOR ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 248 U. S. App. D. C. 155, 770 F. 2d 211.

No. 85–632. ATKINS, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE *v.* RIVERA ET AL. Sup. Jud. Ct. Mass. Motion of respondent Madeline McKenna for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 395 Mass. 189, 479 N. E. 2d 639.

No. 85–5238. CRANE *v.* KENTUCKY. Sup. Ct. Ky. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 690 S. W. 2d 753.

No. 85–5542. FORD *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Motions of National Association of Criminal Defense Lawyers and Office of the Capital Collateral Representative for the State of Florida et al. for leave to file briefs as *amici curiae* granted. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 752 F. 2d 526.

Certiorari Denied

No. 84–1906. ALABAMA *v.* CALLAHAN. Sup. Ct. Ala. Certiorari denied. Reported below: 471 So. 2d 463.

No. 84–6287. CARR *v.* HUTTO, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 737 F. 2d 433.

No. 84–6884. ZABEL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 928.

No. 84–6910. ETHERIDGE *v.* MITCHELL, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 646.

No. 84–6938. PAUL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 762 F. 2d 1002.

No. 84–7003. LACAYO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 1559.

No. 85–228. LASSITER-GEERS *v.* REICHENBACH. Ct. App. Md. Certiorari denied. Reported below: 303 Md. 88, 492 A. 2d 303.

No. 85–251. MORRISON *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 610.

No. 85–252. CENTRAL & SOUTHERN MOTOR FREIGHT TARIFF ASSN. ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 244 U. S. App. D. C. 226, 757 F. 2d 301.

No. 85-282. MATURO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1076.

No. 85-335. DI NAPOLI *v.* NORTHEAST REGIONAL PAROLE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 764 F. 2d 143.

No. 85-379. OHIO NEW & REBUILT PARTS, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 760 F. 2d 1443.

No. 85-413. BLACKWOOD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 131.

No. 85-458. SCHIAVONE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 766 F. 2d 70.

No. 85-466. SOFT DRINK WORKERS, LOCAL 812, ET AL. *v.* MONARCH LONG BEACH CORP.; and
No. 85-667. MONARCH LONG BEACH CORP. *v.* SOFT DRINK WORKERS, LOCAL 812, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 228.

No. 85-538. MEDFORD ASSEMBLY OF GOD *v.* CITY OF MEDFORD, OREGON. Ct. App. Ore. Certiorari denied. Reported below: 72 Ore. App. 333, 695 P. 2d 1379.

No. 85-622. PIETRONIRO ET AL. *v.* BOROUGH OF OCEANPORT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 764 F. 2d 976.

No. 85-623. DALLAS COUNTY, TEXAS, ET AL. *v.* CRANE; and
No. 85-646. WADE *v.* CRANE. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 412 and 766 F. 2d 193.

No. 85-626. ACCIDENT FUND ET AL. *v.* BAERWALDT, COMMISSIONER OF INSURANCE OF THE STATE OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 919.

No. 85-631. CAPRITO ET AL. *v.* MAYHEW, AKA CAPRITO, ET AL. Sup. Ct. La. Certiorari denied. Reported below: 468 So. 2d 561.

No. 85-640. HUGHES ET AL. *v.* HOUSTON NORTHWEST MEDICAL CENTER, INC., ET AL. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. Reported below: 680 S. W. 2d 838.

No. 85–641. HATCH ET AL. *v.* RELIANCE INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 409.

No. 85–655. TEMPLEMAN *v.* CHRIS CRAFT CORP. C. A. 1st Cir. Certiorari denied. Reported below: 770 F. 2d 245.

No. 85–657. ROEHLER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 167 Cal. App. 3d 353, 213 Cal. Rptr. 353.

No. 85–665. PLEASANT VIEW ELEMENTARY SCHOOL PTA *v.* GROUP I DEFENDANTS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 763 F. 2d 652.

No. 85–669. AD HOC COMMITTEE FOR AKWESASNE RIGHTS *v.* REYNOLDS METALS CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 157.

No. 85–680. KOMOTO *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 40 Wash. App. 200, 697 P. 2d 1025.

No. 85–682. BAIR, DIRECTOR, DEPARTMENT OF REVENUE OF IOWA *v.* TRAILER TRAIN CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 765 F. 2d 744.

No. 85–694. DOWTY *v.* PIONEER RURAL ELECTRIC COOPERATIVE, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 52.

No. 85–698. EL CID, LTD. *v.* NEW JERSEY ZINC CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 157.

No. 85–709. CAMPBELL *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 479 So. 2d 1299.

No. 85–738. CHAMBERS *v.* KENTUCKY. Cir. Ct. Ky., Campbell County. Certiorari denied.

No. 85–739. ALLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 2d 1351.

No. 85–741. DAVIS ET AL. *v.* BETHLEHEM STEEL CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 769 F. 2d 210.

No. 85–765. BLACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 1334.

No. 85–770. DISTRICT COUNCIL 33, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL–CIO, ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 36.

No. 85–784. PAUTZ *v.* WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 927.

No. 85–804. LIKA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 37.

No. 85–5020. DALY *v.* UNITED STATES;
No. 85–5101. HULSEY ET AL. *v.* UNITED STATES;
No. 85–5235. KLIR *v.* UNITED STATES; and
No. 85–5236. ROSS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 2d 1076.

No. 85–5155. MCKINNEY *v.* ELLIS ET AL. C. A. 8th Cir. Certiorari denied.

No. 85–5287. HAISLIP *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 237 Kan. 461, 701 P. 2d 909.

No. 85–5306. SILAS *v.* WINANS, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 85–5313. BURNSIDE *v.* WHITE, SUPERINTENDENT, ALGOA CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 760 F. 2d 217.

No. 85–5332. HOPKINSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 767 F. 2d 705.

No. 85–5333. TAYLOR *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied.

No. 85–5538. ACOSTA *v.* KRACO, INC., ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 471 So. 2d 24.

No. 85–5643. CHATMAN *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 480 So. 2d 1274.

No. 85–5620. FRONEBERGER *v.* ARMSTRONG ET AL. C. A. 4th Cir. Certiorari denied.

No. 85–5627. HENDERSON *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 85–5636. DAVIS *v.* GUPTON, SUPERINTENDENT, PIEDMONT CORRECTIONAL CENTER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 911.

No. 85–5637. BEZOTTE *v.* MADISON COUNTY COMMISSIONERS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 1122.

No. 85–5567. BULLOCK *v.* DIRECTOR, DEPARTMENT OF CORRECTIONS. Ct. App. Va. Certiorari denied. Reported below: 1 Va. App. 70, 334 S. E. 2d 150.

No. 85–5671. KIMBLE *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE PRISON, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1166.

No. 85–5675. DISBROW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 768 F. 2d 976.

No. 85–5689. GRANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 772 F. 2d 901.

No. 85–5690. JANKOWSKI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 771 F. 2d 70.

No. 85–5696. PARRA *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 165 Cal. App. 3d 874, 212 Cal. Rptr. 53.

No. 85–5697. SPRINGSTON *v.* PACIFIC INTERMOUNTAIN EXPRESS CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85–5706. COLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 774 F. 2d 1153.

No. 85–5709. FOREMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 771 F. 2d 1382.

No. 85–5710. DARLING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 766 F. 2d 1095.

No. 85–5713. LEWIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 771 F. 2d 454.

No. 85–5716. SAWYER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 867.

No. 85–5722. COLLINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 909.

No. 85–5728. CROOKER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 774 F. 2d 1148.

No. 85–5732. PATTERSON *v.* GEORGIA THEATRE CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 776 F. 2d 1055.

No. 85–5751. GATI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85–5759. LAPSLEY *v.* LEGAL SERVICES OF MAUMEE VALLEY. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 926.

No. 85–5781. CASWELL *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 85–111. MICHIGAN *v.* LITTLE. Ct. App. Mich. Certiorari denied.

CHIEF JUSTICE BURGER, with whom JUSTICE BLACKMUN and JUSTICE REHNQUIST join, dissenting.

In this case, an informant told police that he had made a purchase of narcotics from one James Johnson at Johnson's home. Based on this information, police secured search warrants for Johnson and for his home. Before executing the warrants, one of the police officers purchased heroin from Johnson in Johnson's backyard. Shortly thereafter, police went to the house, announced their authority, presence, and purpose, and entered. They arrested Johnson and seized packets of heroin he had tried to throw away. Officer Allen then noticed respondent in an adjacent room. Allen made a "patdown" prophylactic search for

weapons. He testified that he felt what seemed "to be a coin envelope or narcotics paraphernalia" in respondent's pocket. Allen removed the envelope and discovered heroin inside. The trial court granted respondent's motion to suppress the evidence, and the Michigan Court of Appeals affirmed, relying on *Ybarra* v. *Illinois*, 444 U. S. 85 (1979).

Ybarra in no sense controls this case. In *Ybarra*, police obtained a warrant authorizing the search of a *public bar* and of the bartender. Police entered the bar and immediately searched nearly a dozen patrons, including Ybarra, for weapons. The initial search of Ybarra revealed no weapons. Police returned several minutes later, searched Ybarra again, and found a small packet of heroin. The Court's holding in *Ybarra* that the second search violated Ybarra's Fourth Amendment rights was based on the presence of Ybarra in a *public place* under circumstances which, in the view of the Court, did not legitimately focus suspicion on Ybarra. *Id.*, at 91.

Here, however, respondent Little was not a member of the public present in a public place. He and Johnson were the only two people present in a dwelling that a Magistrate had determined was probably a center of illicit drug activity. Upon entering Johnson's home, the police discovered packets of heroin which Johnson had attempted to dispose of, indicating that illicit drug activity had occurred as recently as moments before their entry. Evidence of such activity could have been placed on the person of someone in the premises as easily as it could have been hidden in a dresser drawer. Under the circumstances, the police reasonably concluded that the nexus between respondent Little and the illicit drug activity was sufficiently close to give them probable cause to conduct a cursory search of respondent's person as part of their search of Johnson's home pursuant to a valid search warrant.

The Michigan Court of Appeals concluded that the search became unreasonable as soon as Officer Allen discovered that respondent was unarmed; Allen's determination coincided, however, with his discovery of what he reasonably suspected was narcotics paraphernalia. At that point, Officer Allen could confirm or dispel that suspicion by removing the object, only marginally increasing the intrusiveness of the search. Under these circumstances, the justification for the search outweighed the invasion that the

search entailed. The Michigan Court of Appeals misconstrued *Ybarra*, and its decision represents an unwarranted expansion of our holding in that case. This is the kind of result that undermines public confidence in the administration of justice. I would grant certiorari to give plenary consideration to this case.

No. 85–314. JAMES, WARDEN *v.* TYLER. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 755 F. 2d 741.

No. 85–5283. ASPERO, AKA ROSEBERRY *v.* SHEARSON AMERICAN EXPRESS, INC. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 768 F. 2d 106.

No. 85–5551. HOPKINSON *v.* WYOMING. Sup. Ct. Wyo.;

No. 85–5608. SMITH *v.* NORTH CAROLINA. Super. Ct. N. C., Halifax County; and

No. 85–5648. MOORE *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: No. 85–5551, 704 P. 2d 1323; No. 85–5648, 479 N. E. 2d 1264.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85–5557. GRACE ET AL. *v.* BURGER, CHIEF JUSTICE OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 246 U. S. App. D. C. 167, 763 F. 2d 457.

Rehearing Denied

No. 84–2016. GREYHOUND LINES, INC. *v.* WILHITE ET AL., *ante*, p. 910;

No. 84–6780. SMITH *v.* FRANCIS, WARDEN, *ante*, p. 925; and

No. 85–83. ZERMAN *v.* MELTON ET AL.; ZERMAN *v.* PRUDENTIAL-BACHE SECURITIES ET AL.; and ZERMAN *v.* JACOBS ET AL., *ante*, p. 845. Petitions for rehearing denied.

No. 85–123. MUKA *v.* CARTER, CHIEF DISCIPLINARY COUNSEL, *ante*, p. 895;

No. 85–152. THOMPSON ET AL. *v.* FIRST NATIONAL BANK & TRUST CO., *ante*, p. 895;

No. 85–159. REMMENGA ET UX. *v.* CALIFORNIA COASTAL COMMISSION, *ante*, p. 915;

No. 85–204. CHICAGO TRIBUNE CO. ET AL. *v.* JOHNSON, DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE, ET AL., *ante*, p. 915;

No. 85–284. HAYES *v.* CANNON ET AL., *ante*, p. 903;

No. 85–607. BURCHE *v.* CATERPILLAR TRACTOR CO., *ante*, p. 971;

No. 85–5164. COLLINS ET AL. *v.* ILLINOIS, *ante*, p. 935;

No. 85–5171. WILSON *v.* LOUISIANA, *ante*, p. 911;

No. 85–5195. GREEN *v.* SCHWARZER, U. S. DISTRICT JUDGE, *ante*, p. 921;

No. 85–5338. COLLINS *v.* UNITED STATES, *ante*, p. 922; and

No. 85–5456. BODINE *v.* DEPARTMENT OF TRANSPORTATION ET AL., *ante*, p. 923. Petitions for rehearing denied.

No. 84–6962. CAPE *v.* FRANCIS, WARDEN, *ante*, p. 911. Motion for leave to file petition for rehearing denied.

DECEMBER 16, 1985

Appeals Dismissed

No. 85–636. NYFLOT *v.* MINNESOTA COMMISSIONER OF PUBLIC SAFETY. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 369 N. W. 2d 512.

JUSTICE WHITE, with whom JUSTICE STEVENS joins, dissenting.

Shortly after 1:30 o'clock on the morning of September 23, 1984, appellant Janice Nyflot was arrested for driving under the influence of alcohol. She immediately requested that she be allowed to speak with an attorney, but this request was denied. She was then taken to the local law enforcement center. There, she was advised that state law required that she be tested to determine if she was under the influence of alcohol or a controlled substance and that refusal to allow such a test would result in her driver's license being revoked for a minimum of one year. She was

further advised that refusal to take the test could be offered in evidence against her at trial. Finally, she was told that if she consented to the test and the test indicated that she was under the influence of alcohol or a controlled substance, she would be subject to criminal prosecution and her right to drive could be revoked for a minimum of 90 days. And she was advised that she had the right, *after* submitting to the testing, to consult with an attorney and to have additional tests done by someone of her own choosing. These admonitions complied with the advice requirements of the state implied consent statute. See Minn. Stat. § 169.123, subd. 2(b) (1984).

After being thus advised, Nyflot informed the police officer that she would not submit to testing without first speaking to an attorney. She was again told that she would not be allowed to speak with an attorney before deciding whether to take the test. She again declined to consent to the test. The police officer then informed her that she had effectively refused the test and allowed her to contact her attorney. Immediately after contacting her attorney, she indicated her willingness to take the test, but she was told that she had been deemed to have refused it and could no longer consent. Her license was then revoked for one year based on her refusal.

The state trial court upheld the revocation against Nyflot's challenge that she had a right to counsel for the purpose of determining whether to consent to the blood alcohol test, which right had been unconstitutionally denied. The Minnesota Court of Appeals reversed, holding that a limited right to counsel was provided by state law. 365 N. W. 2d 266 (1985). The Minnesota Supreme Court, with two justices dissenting, reversed again and upheld the revocation. 369 N. W. 2d 512 (1985).

The Minnesota Supreme Court first rejected the Court of Appeals' conclusion that a right to counsel in this situation was provided by state law. Then, turning to Nyflot's federal constitutional challenge, the court held that no Sixth Amendment right to counsel extended to the decision whether to consent to testing. The court reasoned that *Kirby* v. *Illinois*, 406 U. S. 682 (1972), concluded that "the Sixth Amendment right to counsel did not attach until judicial proceedings are formally commenced (by indictment, complaint or substitute for complaint)." 369 N. W. 2d, at 516. See also *United States* v. *Gouveia*, 467 U. S. 180 (1984). Although acknowledging that this Court has recognized exceptions

to this rule for the purposes of protecting a defendant's Fifth Amendment rights, see, *e. g.*, *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the Minnesota Supreme Court concluded that this Court "is unlikely to find other situations requiring a triggering of the right to counsel before the formal initiation of a criminal prosecution" and that "[i]t is also clear that the right to counsel recognized in *Miranda* does not apply to the limited questioning of a driver to determine if he will consent to a chemical test." 369 N. W. 2d, at 516 (citing *South Dakota* v. *Neville*, 459 U. S. 553, 564 n. 15 (1983)).

Nyflot now appeals, claiming that she had a Sixth Amendment right to counsel with respect to the decision whether to consent to the blood alcohol test. She asserts that in the special context of a driving-while-intoxicated offense, formal proceedings must be considered to have commenced with the issuance of a traffic ticket, which is in essence a summons to appear in court and the functional equivalent of a complaint. Since the ticket could be given *before* the test (because the driver is not taken in for testing unless she is unable to pass field sobriety or breath tests), the actual police procedures may not be manipulated so as to change the time when adversary proceedings are considered to have begun. Thus, adversary proceedings should be deemed to have been initiated before the test. The right to counsel having attached, Nyflot then argues that the decision whether to consent to the test is a "critical stage" in the proceeding, since it in essence is a decision as to what type of evidence will be available to be used against the driver—the results of the test or the refusal to consent to it. See *Gouveia*, *supra*, at 189.

Most of the courts that have considered this issue have rejected the argument that the Sixth Amendment right to counsel covers the stage at which the decision whether to consent to the blood alcohol test must be made. See, *e. g.*, *Sites* v. *State*, 300 Md. 702, 711, 481 A. 2d 192 (1984) (collecting cases). A few, however, have found that the Sixth Amendment right to counsel does extend to this stage. See, *e. g.*, *Heles* v. *South Dakota*, 530 F. Supp. 646 (SD), vacated as moot, 682 F. 2d 201 (CA8 1982); *Forte* v. *State*, 686 S. W. 2d 744 (Tex. App.), review granted by Tex. Ct. App., Oct. 23, 1985, No. 2–84–012–Cr.; *State* v. *Welch*, 135 Vt. 316, 376 A. 2d 351 (1977) (superseded by state statutory right to counsel, see *State* v. *Duff*, 136 Vt. 537, 394 A. 2d 1145 (1978)). Other courts have found a right to counsel based on state law,

see, *e. g.*, *State* v. *Fitzsimmons*, 94 Wash. 2d 858, 620 P. 2d 999 (1980), or on general due process guarantees, see, *e. g.*, *State* v. *Newton*, 291 Ore. 788, 636 P. 2d 393 (1981) (en banc plurality).

Given these varying results, I would note probable jurisdiction to settle the question presented.

No. 85–5686. GAINES *v.* MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS. Appeal from C.A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 776 F. 2d 1050.

No. 85–5761. MIHAL *v.* JAFFE, JUDGE, CUYAHOGA COUNTY COURT OF COMMON PLEAS. Appeal from Sup. Ct. Ohio dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Miscellaneous Orders

No. D–503. IN RE DISBARMENT OF SMITH. Disbarment entered. [For earlier order herein, see 472 U. S. 1014.]

No. D–513. IN RE DISBARMENT OF NASH. Disbarment entered. [For earlier order herein, see 473 U. S. 931.]

No. D–518. IN RE DISBARMENT OF O'BOYLE. Disbarment entered. [For earlier order herein, see *ante*, p. 896.]

No. D–520. IN RE DISBARMENT OF WATSON. Disbarment entered. [For earlier order herein, see *ante*, p. 808.]

No. D–521. IN RE DISBARMENT OF KLINE. Disbarment entered. [For earlier order herein, see *ante*, p. 896.]

No. D–537. IN RE DISBARMENT OF KIDWELL. It is ordered that Wesley Earl Kidwell, Jr., of Rockville, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 84–1076. TRANSCONTINENTAL GAS PIPE LINE CORP. *v.* STATE OIL AND GAS BOARD OF MISSISSIPPI ET AL. Sup. Ct. Miss. [Probable jurisdiction noted, 470 U. S. 1083.] Motion of appellee Coastal Exploration, Inc., for leave to file a supplemental brief after argument granted.

No. 84–1181. NEW YORK *v.* CLASS. Ct. App. N. Y. [Certiorari granted, 471 U. S. 1003.] Motion of respondent for leave to file a supplemental brief after argument granted.

No. 84–1728. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. D. C. Cir. [Certiorari granted, 472 U. S. 1026.] Motion of respondent American Federation of Government Employees, AFL–CIO, National Council of EEOC Locals, for divided argument denied.

No. 84–1903. POSADAS DE PUERTO RICO ASSOCIATES, DBA CONDADO HOLIDAY INN *v.* TOURISM COMPANY OF PUERTO RICO ET AL. Sup. Ct. P. R. [Probable jurisdiction postponed, *ante*, p. 917.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 85–88. PAULUSSEN *v.* HERION. Super. Ct. Pa. [Probable jurisdiction noted, *ante*, p. 899.] Motion of Neighborhood Legal Services Association for leave to file a brief as *amicus curiae* granted.

No. 85–473. CARGILL, INC., ET AL. *v.* MONFORT OF COLORADO, INC. C. A. 10th Cir. Motion of petitioners for leave to submit Rule 28.1 material under seal granted. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 85–541. BARCLAYSAMERICAN/CREDIT, INC. *v.* QUILLER ET UX.;

No. 85–584. GRANT ET AL. *v.* GENERAL ELECTRIC CREDIT CORP.; and

No. 85–717. QUILLER ET UX. *v.* BARCLAYSAMERICAN/CREDIT, INC. C. A. 11th Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States. JUSTICE BLACKMUN took no part in the consideration or decision of this order.

No. 85–5487. SMITH *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. [Certiorari granted, *ante*, p. 918.] Motion of New Jersey Department of the Public Advocate for leave to file a brief as *amicus curiae* granted.

No. 85–5304. IN RE WARD. Petition for writ of mandamus denied.

No. 85–815. IN RE DAVIS ET AL. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied. (See also Nos. 85–5686 and 85–5761, *supra.*)

No. 84–6831. FERGUSON ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 758 F. 2d 843.

No. 84–6918. WANDEL *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 696 P. 2d 288.

No. 85–67. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 20.

No. 85–142. KASVIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 887.

No. 85–245. UTZ *v.* UNITED STATES; and
No. 85–5323. WELLINGTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 754 F. 2d 1457.

No. 85–255. SUNNYSIDE VALLEY IRRIGATION DISTRICT *v.* UNITED STATES ET AL.; and
No. 85–451. UNION GAP IRRIGATION DISTRICT ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 763 F. 2d 1032.

No. 85–471. NORDGREN ET AL. *v.* MILLIKEN, DIRECTOR, UTAH DIVISION OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 762 F. 2d 851.

No. 85–483. ROTHMAN *v.* NEW YORK STATE DEPARTMENT OF TRANSPORTATION. C. A. 2d Cir. Certiorari denied. Reported below: 763 F. 2d 507.

No. 85–493. REEHLMAN *v.* MCNAMARA, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 763 F. 2d 670.

No. 85–501. GREENSPUN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1076.

No. 85–537. CAMPBELL *v.* MAINE; and FRIEL *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 497 A. 2d 467 (first case); 497 A. 2d 475 (second case).

No. 85–652. STONE *v.* MERIT SYSTEMS PROTECTION BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 293, 764 F. 2d 926.

No. 85–658. MORGANSTERN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 771 F. 2d 143.

No. 85–671. PRUESSNER ET AL. *v.* BENTON, SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 368 N. W. 2d 74.

No. 85–672. COHRAN *v.* CARLIN ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 254 Ga. 580, 331 S. E. 2d 523.

No. 85–677. NEGRITO COMERCIAL, S.A. *v.* SEA-LAND SERVICE, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 1118.

No. 85–678. UNITED PACIFIC INSURANCE CO. ET AL. *v.* ANIERO CONCRETE CO., INC. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85–692. SHUBA *v.* AUSTINTOWN BOARD OF EDUCATION. Ct. App. Ohio, Mahoning County. Certiorari denied.

No. 85–711. PASCO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 913.

No. 85–721. STETZ, PERSONAL REPRESENTATIVE OF THE ESTATE OF ATTWOOD *v.* GRANT. C. A. 4th Cir. Certiorari denied.

No. 85–723. MOTTA *v.* SAMUEL WEISER, INC. C. A. 1st Cir. Certiorari denied. Reported below: 768 F. 2d 481.

No. 85–730. FARKAS *v.* NEW YORK STATE DEPARTMENT OF HEALTH. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 907.

No. 85–737. PINNEY DOCK & TRANSPORT CO. ET AL. *v.* PENN CENTRAL CORP. C. A. 3d Cir. Certiorari denied. Reported below: 771 F. 2d 762.

No. 85–745. HAZELWOOD ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1162.

No. 85–760. HAFNER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 474 So. 2d 202.

No. 85–783. MARTIN-TRIGONA *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 293, 764 F. 2d 926.

No. 85–790. CUDDY *v.* CARMEN, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 25, 762 F. 2d 119.

No. 85–830. ELLINGTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1164.

No. 85–845. DEMJANJUK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 922.

No. 85–846. DEMJANJUK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 922.

No. 85–848. DRAGATSIS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1168.

No. 85–865. LAMBERT *v.* UNITED STATES; and
No. 85–5900. BLOCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 771 F. 2d 83.

No. 85–869. LIGHT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 158.

No. 85–5278. BROWN *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 470 So. 2d 56.

No. 85–5322. VAN HOFF *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 371 N. W. 2d 180.

No. 85–5347. NICHOLS *v.* TEXAS. Ct. App. Tex., 3d Sup. Jud. Dist. Certiorari denied.

No. 85–5356. HERNANDEZ *v.* UNITED STATES BUREAU OF PRISONS. C. A. 10th Cir. Certiorari denied.

No. 85–5370. HARRELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 754 F. 2d 1153.

No. 85–5372. LEVITT *v.* MONROE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 1224.

No. 85–5445. IN RE MARTIN-TRIGONA. C. A. 1st Cir. Certiorari denied.

No. 85–5337. SCHEPPF *v.* KING, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 468 So. 2d 39.

No. 85–5657. RODRIGUEZ *v.* HOLLAHAN, WARDEN. Sup. Ct. Ariz. Certiorari denied.

No. 85–5659. MALLY *v.* NEW YORK UNIVERSITY. C. A. 2d Cir. Certiorari denied.

No. 85–5660. DAY *v.* WETTMAN, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied.

No. 85–5662. GROSHON *v.* DOUGLAS. C. A. 10th Cir. Certiorari denied.

No. 85–5664. WARDEN *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 770 F. 2d 112.

No. 85–5666. BURTON *v.* EVAN ET AL. C. A. 8th Cir. Certiorari denied.

No. 85–5667. BURTON *v.* DIAMOND ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 905.

No. 85–5668. MALLY *v.* NEW YORK UNIVERSITY ET AL. C. A. 2d Cir. Certiorari denied.

No. 85–5673. STAMPS *v.* PIMA COUNTY SUPERIOR COURT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 913.

No. 85–5682. GREGORY *v.* AUGER, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 768 F. 2d 287.

No. 85–5684. BOWEN *v.* FOLTZ, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 85–5691. ROMER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85–5695. FRAZIER *v.* PLACER SAVINGS & LOAN ASSN. ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 85–5719. SCANLAND *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 473 So. 2d 1182.

No. 85–5721. COWELL *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 85–5754. BRYANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 774 F. 2d 1156.

No. 85–5758. OKELLO *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1486.

No. 85–5770. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 768.

No. 85–5772. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 1339.

No. 85–5773. DERKSEN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied.

No. 85–5795. YELLEN *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 704 P. 2d 306.

No. 84–750. EASTERN AIR LINES, INC. *v.* WINBOURNE. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 758 F. 2d 1016.

No. 85–237. HENRY ET AL. *v.* CITY OF DETROIT MANPOWER DEPARTMENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 763 F. 2d 757.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

The issue presented in this case is whether an order denying a civil rights plaintiff's motion for appointment of counsel is a final decision appealable as a matter of right under 28 U. S. C. § 1291. Three among petitioners are Title VII plaintiffs who moved for and were denied appointment of counsel pursuant to 42 U. S. C. § 2000e–5(f)(1)(B); a fourth petitioner, a plaintiff in an action under 42 U. S. C. § 1983, moved for and was denied appointment of counsel pursuant to 28 U. S. C. § 1915(d). Petitioners appealed to the United States Court of Appeals for the Sixth Circuit, which dismissed the appeals on the grounds that the orders denying appointment of counsel are not final for purposes of 28 U. S. C. § 1291. 763 F. 2d 757 (1985). This decision, while not without support among the Courts of Appeals, conflicts with the decisions in *Caston* v. *Sears, Roebuck, & Co., Hattiesburg, Miss.*, 556 F. 2d 1305 (CA5 1977) (order denying appointment of counsel pursuant

to § 2000e–5(f)(1)(B) is final for purposes of § 1291), and *Slaughter* v. *City of Maplewood*, 731 F. 2d 587 (CA8 1984) (to the same effect). I would grant certiorari to resolve this conflict among the Courts of Appeals on this plainly recurring question.

No. 85–307. ESTATE OF ROCKEFELLER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 762 F. 2d 264.

No. 85–461. CONTROL DATA CORP. *v.* C. E. SERVICES, INC. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 759 F. 2d 1241.

No. 85–5658. MALLY *v.* INTERNATIONAL BUSINESS MACHINES CORP. ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 85–484. MILLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 763 F. 2d 133.

No. 85–570. HOLLOWAY *v.* WALKER, JUDGE, 162D JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 765 F. 2d 517.

No. 85–586. CAYLOR *v.* CITY OF RED BLUFF ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

In *Patsy* v. *Florida Board of Regents*, 457 U. S. 496 (1982), this Court held that exhaustion of state administrative remedies is not a prerequisite to bringing an action in federal court under 42 U. S. C. § 1983. In the present case, the California Court of Appeal held that *Patsy* applies only in the context of a § 1983 suit brought in *federal* court. Because petitioner was suing in a California court for employment discrimination without having exhausted the possibility of remedies through a complaint to the California Fair Employment Practices Commission, his § 1983 suit was held properly dismissed. This holding postponing the federal

§ 1983 remedy pending pursuit of state remedies is questionable under *Patsy*, and conflicts with the decision of the Connecticut Supreme Court in *Fetterman* v. *University of Connecticut*, 192 Conn. 539, 473 A. 2d 1176 (1984), where *Patsy* was held to prevent state as well as federal courts from imposing a requirement of exhaustion of state administrative remedies on § 1983 plaintiffs. I would grant certiorari to resolve this conflict.

No. 85-659. HOPFMANN *v.* UNITED STATES FEDERAL ELECTION COMMISSION ET AL. C. A. D. C. Cir. Motion of The Free Congress Research and Education Foundation for leave to file a brief as *amicus curiae* granted. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 246 U. S. App. D. C. 44, 762 F. 2d 138.

No. 85-5642. HANCE *v.* GEORGIA. Sup. Ct. Ga.;
No. 85-5663. CONKLIN *v.* GEORGIA. Sup. Ct. Ga.;
No. 85-5665. BELL *v.* ALABAMA. Sup. Ct. Ala.;
No. 85-5694. MCKAGUE *v.* NEVADA. Sup. Ct. Nev.; and
No. 85-5701. BROWN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 85-5642, 254 Ga. 575, 332 S. E. 2d 287; No. 85-5663, 254 Ga. 558, 331 S. E. 2d 532; No. 85-5665, 475 So. 2d 609; No. 85-5694, 101 Nev. 327, 705 P. 2d 127; No. 85-5701, 473 So. 2d 1260.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85-5693. OWENS, BY HIS GUARDIAN AD LITEM, OWENS *v.* BOURNS, INC., ET AL. C. A. 4th Cir. Motion of National Federation of the Blind for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 766 F. 2d 145.

Rehearing Denied

No. 85-368. SEIBOLD *v.* UNR-ROHN CO., *ante*, p. 920;
No. 85-5180. MADEJ *v.* ILLINOIS, *ante*, p. 935; and
No. 85-5395. FOWLER *v.* SOUTHEAST TOYOTA DISTRIBUTORS, INC., ET AL., *ante*, p. 951. Petitions for rehearing denied.

DECEMBER 19, 1985

Dismissal Under Rule 53

No. 85–733. FARM STORES, INC. *v.* TEXACO INC. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 763 F. 2d 1335.

DECEMBER 20, 1985

Dismissal Under Rule 53

No. 85–173. KEY INTERNATIONAL MANUFACTURING, INC. *v.* MORSE/DIESEL, INC., ET AL. C. A. 2d Cir. Certiorari dismissed as to respondents Den-Al Realty Corp. and Carden Construction Corp. under this Court's Rule 53. Reported below: 762 F. 2d 990.

JANUARY 9, 1986

Certiorari Denied

No. 85–6155 (A–531). ROACH *v.* AIKEN, WARDEN, ET AL. C. A. 4th Cir. Application for stay of execution of sentence of death scheduled for Friday, January 10, 1986, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 781 F. 2d 379.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting). Accordingly, I would vacate the death sentence and remand the case so that the state court can determine what sentence—other than death—may be appropriate.

In addition, this case affords us an opportunity to address the important question whether an accused may, consistent with the Eighth and Fourteenth Amendments, be sentenced to death for a capital offense he committed while a juvenile. Although "[c]rimes committed by youths may be just as harmful to victims as those committed by older persons, . . . they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults." Twentieth

Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978). As we stated in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982):

> "[Youth] is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. *Bellotti* v. *Baird*, 443 U. S. 622, 635 (1979)." *Id.*, at 115–116 (footnotes omitted).

The need for solicitude for the particular susceptibility of juveniles is well reflected by the facts of this case. The trial judge found that petitioner acted under duress or under the domination of an older person, and that he was suffering from mental retardation and a personality disorder. See *Roach* v. *Martin*, 757 F. 2d 1463, 1468–1469 (CA4 1985). In addition, petitioner now presents evidence suggesting that he suffers from the debilitating effects of Huntington's disease. Under these circumstances, even accepting the Court's current interpretation of the Eighth Amendment, sentencing petitioner to death may be inconsistent with the "'evolving standards of decency that mark the progress of a maturing society,'" *Gregg* v. *Georgia*, *supra*, at 173 (quoting *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion of Warren, C. J.)), and may provide no more than "marginal contributions to any discernible social or public purposes." *Furman* v. *Georgia*, 408 U. S. 238, 312 (1972) (WHITE, J., concurring). "Even if some percentage of adults are deterred by the death penalty, the deterrent effect tends to lose much of its power when imposed upon an adolescent." Streib, Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen, 36 Okla. L. Rev., 613, 639 (1983). I would grant the petition for certiorari to resolve this important issue, and would stay petitioner's execution until we decide the matter. At the very least, in light of the evidence suggesting that petitioner suffers from Huntington's disease, I agree with JUSTICE MARSHALL that the stay should be granted and the case held pending our decision in *Ford* v. *Wainwright*, No. 85–5542, cert. granted, *ante*, p. 1019.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The State of South Carolina intends to execute petitioner James Terry Roach tomorrow, January 10, 1986, at 5 a.m. At approximately noon today, four hours after he presented his federal habeas claims to the Court of Appeals and was denied all relief, petitioner came to this Court, seeking a stay of execution and a writ of certiorari. Among other claims, Roach's counsel contends that Roach has been rendered so mentally incompetent by Huntington's disease that his execution would offend the contemporary standards of decency embodied in the Eighth Amendment. One month ago, this Court granted certiorari to resolve the issues whether the execution of the presently mentally incompetent offends the Eighth Amendment and, if it does, what process is due a condemned prisoner who might lack any understanding of the penalty he faces. *Ford* v. *Wainwright*, No. 85–5542, cert. granted, *ante*, p. 1019. Because in the 17 hours allowed it by the regime of *Barefoot* v. *Estelle*, 463 U. S. 880 (1983),* this Court has decided to allow Roach to go to his death while the question of his execution's constitutionality is yet to be resolved, I must dissent from the denial of petitioner's application for a stay of execution.

In 1977, several months before his 18th birthday, petitioner pleaded guilty to two counts of murder and charges of criminal sexual assault, kidnaping, and armed robbery. At the capital sentencing hearing, a psychiatrist appearing on Roach's behalf testified that while Roach was mentally retarded, he could not, at that time, be diagnosed as suffering from Huntington's disease. Huntington's disease is an inherited disorder of movement, personality, and thought that often does not manifest itself until an individual has reached adulthood. *Roach* v. *Martin*, 757 F. 2d 1463, 1473 (CA4 1985). After considering this and other mitigating factors, however, the trial judge sentenced Roach to death on both murder counts. The conviction and sentence were upheld on direct review, *State* v. *Shaw (Roach)*, 273 S. C. 194, 255 S. E. 2d 799 (1979), and this Court denied certiorari, 444 U. S. 1026 (1980).

In his first federal habeas petition, Roach urged that he had indeed inherited Huntington's disease from his mother, who had

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*See Note, Summary Processes and the Rule of Law: Expediting Death Penalty Cases in the Federal Courts, 95 Yale L. J. 349 (1985).

already been diagnosed as having that disorder in an early stage. Roach further alleged that, were he given the opportunity to prove this fact, he could raise doubts as to both his competency to stand trial and the appropriateness of his death sentence. It appears that Roach did not press any claim of his present incompetence to be executed, for, in affirming the District Court's denial of his habeas petition, the Court of Appeals concluded:

> "[E]ven assuming arguendo that Roach does in fact have the Huntington's gene, in which case HD [Huntington's disease] will inevitably manifest its symptoms, we can see no way that this fact alone would alter Roach's conviction and sentence. In other words, a determination today that Roach has the HD gene would not affect the findings that Roach was sane at the time of the offenses and that he was competent to stand trial, and is now competent." 757 F. 2d, at 1474.

The petition now before this Court, however, goes beyond mere allegations that Roach suffers from an as-yet-unmanifested genetic disorder. Accompanying his petition is an affidavit by Dr. William H. Olsen, a distinguished neurologist who, less than two weeks ago, was the first neurologist to have examined Roach in the last five years. Dr. Olsen not only found that there is a "reasonable degree of certainty" that Roach suffers from Huntington's disease, but also made a preliminary finding that Roach suffers from the mental deterioration that is a characteristic symptom of the disorder. Dr. Olsen's conclusion, though admittedly preliminary, raises substantial doubts as to whether Roach has any understanding that he is scheduled to die tomorrow morning. Certainly, nothing in the State's papers assuages these doubts.

Neither this Court nor the State of South Carolina is now in a position to ascertain whether Roach is indeed sufficiently competent to face his execution with the dignity that is the final right we allow even the most heinous criminals. What we can do is allow Roach's counsel and experts the time and opportunity to make such a showing. The Court's refusal to do so even while it prepares to hear a case in which another condemned man raises a similar claim, provides yet another stark example of the arbitrariness with which the death penalty is administered in the United States today. I would grant the stay and defer consideration of Roach's petition for certiorari pending this Court's decision in *Ford* v. *Wainwright*, *supra*.

JANUARY 13, 1986

Appeals Dismissed

No. 85-749. MICHELLE MARIE W., A MINOR BY AND THROUGH HER GUARDIAN AD LITEM, WILLIAMS, ET AL. *v.* RILEY ET AL. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. JUSTICE WHITE and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 39 Cal. 3d 354, 703 P. 2d 88.

No. 85-773. ATLANTIC RICHFIELD CO. ET AL. *v.* ALASKA ET AL. Appeal from Sup. Ct. Alaska dismissed for want of substantial federal question. THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 705 P. 2d 418.

No. 85-787. DAVES *v.* STATE BAR OF TEXAS. Appeal from Ct. App. Tex., 7th Sup. Jud. Dist. dismissed for want of substantial federal question. Reported below: 691 S. W. 2d 784.

No. 85-5455. GARCIA, AKA TRAVALINO *v.* DIXON ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 760 F. 2d 275.

No. 85-5853. ROYSE *v.* UNITED STATES ET AL. Appeal from D. C. W. D. Wash. dismissed for want of jurisdiction.

Miscellaneous Orders

No. — - ——. RAMIREZ *v.* CALIFORNIA. Motion to permit petitioner to proceed *in forma pauperis* without submitting an affidavit of indigency denied.

No. A-436. DIAZ *v.* UNITED STATES. Application for release on bail pending trial, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-453 (85-5989). HORAN *v.* UNITED STATES. C. A. 3d Cir. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. D-525. IN RE DISBARMENT OF PHELPS. Robert Edward Phelps, Jr., of Houston, Tex., having requested to resign as a

member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on October 21, 1985 [*ante*, p. 917], is hereby discharged.

No. D–528. IN RE DISBARMENT OF LARKIN. Disbarment entered. [For earlier order herein, see *ante*, p. 941.]

No. D–530. IN RE DISBARMENT OF SIEGFRIED. Scott Thomas Siegfried, of Wadsworth, Ohio, having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on November 4, 1985 [*ante*, p. 941], is hereby discharged.

No. D–538. IN RE DISBARMENT OF VETTER. It is ordered that William V. Vetter, of Tacoma, Wash., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–539. IN RE DISBARMENT OF MUELLER. It is ordered that Donald H. Mueller, of Milwaukee, Wis., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–540. IN RE DISBARMENT OF CHOSID. It is ordered that Richard G. Chosid, of Bloomfield Hills, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–541. IN RE DISBARMENT OF BOULDING. It is ordered that Calvin Roosevelt Boulding, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 84, Orig. UNITED STATES *v.* ALASKA. Application of the Special Master for award of interim compensation granted, and the Special Master is awarded interim compensation in the amount of $75,000 to be paid by the State of Alaska and the United States in equal portions. [For earlier order herein, see, *e. g.*, 465 U. S. 1018.]

No. 104, Orig. NEW JERSEY *v.* NEVADA ET AL. It is ordered that the Honorable Wade H. McCree, Jr., of Ann Arbor, Mich., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and the authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court.

Motion of City of Las Vegas to be dismissed as a party defendant is referred to the Special Master. [For earlier order herein, see *ante*, p. 917.]

No. 84–1076. TRANSCONTINENTAL GAS PIPE LINE CORP. *v.* STATE OIL AND GAS BOARD OF MISSISSIPPI ET AL. Sup. Ct. Miss. [Probable jurisdiction noted, 470 U. S. 1083.] Motion of appellant for leave to file a supplemental brief after argument granted.

No. 84–1545. MILLER-WOHL CO., INC. *v.* COMMISSIONER OF LABOR AND INDUSTRY OF MONTANA ET AL. Appeal from Sup. Ct. Mont. Motions of Chamber of Commerce of the United States, Equal Employment Advisory Council, and American Civil Liberties Union et al. for leave to file briefs as *amici curiae* granted.

No. 84–1656. LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSN. ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 815.] Motion of the Solicitor General for divided argument and for additional time for oral argument denied. Motion of North Carolina Association of Black Lawyers for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument, or in the alternative, for

appointment of counsel to brief and argue in support of judgment below as *amicus curiae* denied.

No. 84–1667. BETHEL SCHOOL DISTRICT NO. 403 ET AL. *v.* FRASER, A MINOR, ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 814.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 84–1726. EAST RIVER STEAMSHIP CORP. ET AL. *v.* TRANSAMERICA DELAVAL INC. C. A. 3d Cir. [Certiorari granted, *ante*, p. 814.] Motions of Pott Industries Inc. and Product Liability Advisory Council, Inc., et al. for leave to file briefs as *amici curiae* granted. Motion of Ingram River Equipment, Inc., for leave to file a brief as *amicus curiae* denied.

No. 84–1903. POSADAS DE PUERTO RICO ASSOCIATES, DBA CONDADO HOLIDAY INN *v.* TOURISM COMPANY OF PUERTO RICO ET AL. Sup. Ct. P. R. Motions for leave to file briefs as *amici curiae* filed by the following are granted: American Association of Advertising Agencies, Inc., Atlantic City Casino Association, American Federation of Labor and Congress of Industrial Organizations, American Newspaper Publishers Association, National Broadcasting Co., Inc., and American Broadcasting Cos., Inc., et al.

No. 84–1905. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* OWENS ET AL. D. C. C. D. Cal. [Probable jurisdiction noted *sub nom. Heckler* v. *Owens*, *ante*, p. 899.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 85–385. BROCK, SECRETARY OF LABOR *v.* PIERCE COUNTY. C. A. 9th Cir. [Certiorari granted, *ante*, p. 944.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 85–434. UNITED STATES *v.* JAMES ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 978.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 84–1973. THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION *v.* WOLD ENGINEERING, P. C., ET AL. Sup. Ct. N. D. [Certiorari granted, *ante*, p. 900.] Motions of

Standing Rock Sioux Tribe et al. and Turtle Mountain Band of Chippewa Indians for leave to file briefs as *amici curiae* granted.

No. 84–1974. ROSE, WARDEN *v.* CLARK. C. A. 6th Cir. [Certiorari granted, *ante*, p. 816.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84–1979. MERITOR SAVINGS BANK, FSB *v.* VINSON ET AL. C. A. D. C. Cir. [Certiorari granted *sub nom. PSFS Savings Bank* v. *Vinson*, *ante*, p. 815.] Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted.

No. 84–1999. LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL–CIO, C. L. C. *v.* CITY OF CLEVELAND ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 816.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of respondent Vanguards of Cleveland for divided argument granted. Motion of respondents City of Cleveland et al. for divided argument granted.

No. 85–5. PENNSYLVANIA ET AL. *v.* DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 815.] Motion of the Solicitor General for divided argument granted.

No. 85–62. MAINE *v.* TAYLOR ET AL. C. A. 1st Cir. [Probable jurisdiction postponed, *ante*, p. 943.] Motion of the Solicitor General for divided argument granted.

No. 85–88. PAULUSSEN *v.* HERION. Super. Ct. Pa. [Probable jurisdiction noted, *ante*, p. 899.] Motion of Children's Defense Fund et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 85–198. CELOTEX CORP. *v.* CATRETT, ADMINISTRATRIX OF THE ESTATE OF CATRETT. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 944.] Motion of Motor Vehicle Manufacturers Association of the United States, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 85–227. SMALIS ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. [Certiorari granted, *ante*, p. 944.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 85–390. CITY OF LOS ANGELES ET AL. *v.* PREFERRED COMMUNICATIONS, INC. C. A. 9th Cir. [Certiorari granted, *ante*, p. 979.] Motion of Nicholas W. Carlin for leave to file a brief as *amicus curiae* granted.

No. 85–530. O'CONNOR ET AL. *v.* ORTEGA. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1018.] Motion of respondent for leave to proceed further herein *in forma pauperis* denied. Motion of respondent for appointment of counsel denied.

No. 85–581. BULLOCH ET AL. *v.* PEARSON ET AL. C. A. 10th Cir. Motion of Scott M. Matheson for leave to file a brief as *amicus curiae* granted. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 85–641. HATCH ET AL. *v.* RELIANCE INSURANCE CO., *ante*, p. 1021. Motion of respondent for award of damages granted, and damages in the amount of $500 are awarded pursuant to this Court's Rule 49.2. JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS dissent.

No. 85–736. KEMP, WARDEN *v.* THOMAS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 85–5821. WADE *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until February 3, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85–5845. IN RE TRIPATI. Petition for writ of habeas corpus denied.

No. 85–5670. IN RE COLES; and
No. 85–5755. IN RE JOHNSON. Petitions for writs of mandamus denied.

No. 85–5799. IN RE RODMAN; and

No. 85–5800. IN RE RODMAN. Petitions for writs of prohibition denied.

Probable Jurisdiction Noted

No. 85–637. HODEL, SECRETARY OF THE INTERIOR *v.* IRVING ET AL. Appeal from C. A. 8th Cir. Probable jurisdiction noted. Reported below: 758 F. 2d 1260.

No. 85–656. MUNRO, SECRETARY OF STATE OF WASHINGTON *v.* SOCIALIST WORKERS PARTY ET AL. Appeal from C. A. 9th Cir. Probable jurisdiction noted. Reported below: 765 F. 2d 1417.

No. 85–701. FEDERAL ELECTION COMMISSION *v.* MASSACHUSETTS CITIZENS FOR LIFE, INC. Appeal from C. A. 1st Cir. Probable jurisdiction noted. Reported below: 769 F. 2d 13.

No. 85–766. TASHJIAN, SECRETARY OF STATE OF CONNECTICUT *v.* REPUBLICAN PARTY OF CONNECTICUT ET AL. Appeal from C. A. 2d Cir. Probable jurisdiction noted. Reported below: 770 F. 2d 265.

Certiorari Granted

No. 85–494. CALIFORNIA FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* GUERRA, DIRECTOR, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 758 F. 2d 390.

No. 85–767. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION ET AL. *v.* CREST STREET COMMUNITY COUNCIL, INC., ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 769 F. 2d 1025.

No. 85–236. EICHENLAUB *v.* YURKY ET AL. C. A. 3d Cir. Motion of respondent Yurky for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 770 F. 2d 1078.

No. 85–303. MISSOURI *v.* BLAIR. Sup. Ct. Mo. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 691 S. W. 2d 259.

No. 85–473. CARGILL, INC., ET AL. *v.* MONFORT OF COLORADO, INC. C. A. 10th Cir. Certiorari granted. JUSTICE

BLACKMUN took no part in the consideration or decision of this petition. Reported below: 761 F. 2d 570.

No. 85–558. O'CONNOR ET UX. *v.* UNITED STATES;
No. 85–559. COPLIN ET UX. *v.* UNITED STATES; and
No. 85–560. MATTOX ET UX. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 761 F. 2d 688.

No. 85–660. COLORADO *v.* CONNELLY. Sup. Ct. Colo. Motion of Duane Woodard, Attorney General of Colorado, et al. for leave to file a brief as *amici curiae* granted. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. In addition to the question presented by the petition for writ of certiorari, the parties are requested to brief and argue the following question: "Did respondent's mental condition render his waiver of *Miranda* rights ineffective?" Application for stay, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the issuance of the mandate of this Court. Reported below: 702 P. 2d 722.

Memorandum of JUSTICE BRENNAN, with whom JUSTICE STEVENS joins.

This grant of certiorari is yet another instance supporting the concern that the Court shows an unseemly eagerness to act as "the adjunct of the State and its prosecutors in facilitating efficient and expedient conviction . . . ." *Wainwright* v. *Witt*, 469 U. S. 412, 463 (1985) (BRENNAN, J., dissenting). Most often, this concern has been evoked by the Court's overly narrow interpretations of the Constitution's fundamental guarantees and the laws established to secure relief from violations of those guarantees. See *ibid.*; *United States* v. *Leon*, 468 U. S. 897, 928–929 (1984) (BRENNAN, J., dissenting). However, the Court's willingness to take special judicial action to assist the prosecutor has not been limited to its interpretations of substantive law. For example, in *New Jersey* v. *T. L. O.*, 469 U. S. 325 (1985), reargument was directed on a constitutional question not raised by either party because it provided a broader basis for upholding the State's action. Similarly, two Terms ago, JUSTICE STEVENS noted the "quite striking" fact that during the preceding two-and-a-half years the Court had summarily reversed, without briefing or oral argument, 19 criminal cases—every one on the petition of the warden or the prosecutor and every one in his favor. *Florida* v.

Meyers, 466 U. S. 380, 385–387, and n. 3 (1984) (STEVENS, J., dissenting). Nothing has changed in the year and a half since that decision, for, although in the immediate wake of JUSTICE STEVENS' dissent the Court did summarily reverse a few convictions on the petition of a criminal defendant, the trend to grant summary dispositions only in favor of the prosecutor has resumed and the record now stands at 26–4.[1] No particularly informed understanding of statistics is required to appreciate that the likelihood of courts so consistently erring in favor of defendants is truly remote and that only a one-sided exercise of discretion can explain these results.

The Court's treatment of this case provides another clear example of why there is concern that the Court engages in injudicious efforts to assist prosecutors. Today, the Court takes the unprecedented step of rewriting a prosecutor's certiorari petition for him, enabling him to seek reversal on a ground he did not present himself.[2]

Respondent approached a uniformed police officer and stated that "he had killed someone" and wanted to tell the officer about it. Before questioning respondent about the killing, the officer informed respondent of his *Miranda* rights. Respondent waived

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[1] The four cases since *Florida* v. *Meyers* decided in favor of a criminal defendant are: *Payne* v. *Virginia*, 468 U. S. 1062 (1984) *(per curiam); Thompson* v. *Louisiana*, 469 U. S. 17 (1984) *(per curiam); Smith* v. *Illinois*, 469 U. S. 91 (1984) *(per curiam);* and *Lanier* v. *South Carolina*, *ante*, p. 25 *(per curiam).* The seven cases decided in favor of the warden or prosecutor during that same period are: *Massachusetts* v. *Upton*, 466 U. S. 727 (1984) *(per curiam); Florida* v. *Rodriguez*, 469 U. S. 1 (1984) *(per curiam); United States* v. *Woodward*, 469 U. S. 105 (1984) *(per curiam); United States* v. *Gagnon*, 470 U. S. 522 (1985) *(per curiam); United States* v. *Benchimol*, 471 U. S. 453 (1985) *(per curiam); Delaware* v. *Fensterer*, *ante*, p. 15 *(per curiam);* and *Pennsylvania* v. *Goldhammer*, *ante*, p. 28 *(per curiam). Payne*, *Thompson*, and *Smith* followed closely after JUSTICE STEVENS' dissent in *Florida* v. *Meyers*. Since *Smith* was decided on December 10, 1984, however, five of the last six summary dispositions have been in favor of the prosecution.

I am not suggesting that all the summary judgments awarded to the prosecution were incorrect or improper, although I did not agree with the result in many of the cases. It is the Court's selective employment of its summary disposition power only in favor of the prosecution that is most disturbing.

[2] This action is even less justifiable than the improper decision to order reargument in *New Jersey* v. *T. L. O.*, 469 U. S. 325 (1985), since here the Court cannot even point to having heard oral argument as justification for revising the issues presented to suit its own desires.

his rights and proceeded to confess to the murder of a young girl. After being charged with murder, respondent moved to suppress his statements as made involuntarily. A psychiatrist testified that respondent believed that the voice of God had commanded him to confess or commit suicide. The psychiatrist testified that respondent was suffering from "chronic paranoid schizophrenia" and "command auditory hallucinations" when he confessed and that respondent's actions were not the product of a free will. The trial court suppressed statements made both before and after the *Miranda* warnings were given on the ground that respondent's mental state rendered these confessions involuntary and tainted his waiver of the *Miranda* rights. The Colorado Supreme Court affirmed, and this petition followed. The prosecutor carefully limited his petition to this Court to challenge only the suppression of respondent's initial, unsolicited statements. The petition expressly states that "[respondent's] later confession, which involves a *Miranda* issue, is not an issue in this petition." Pet. for Cert. 15. Despite this, the Court directs the parties to brief and argue that issue.

We do not know why the prosecutor chose not to seek review of the *Miranda* issue. But, whatever the reason, review was *not* sought, and it is hardly for this Court to "second chair" the prosecutor to alter his strategy or guard him from mistakes. Under this Court's Rule 21.1(a), "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court." Given petitioner's express disclaimer that the *Miranda* issue is presented, that question obviously is not "fairly included" in the question submitted. The Court's direction that the parties address it anyway makes meaningless in this case the provisions of this Rule and is plainly cause for concern, particularly since it is clear that a similar dispensation would not be granted a criminal defendant, however strong his claim. In asking the parties to address issues that the State chose not to present in the petition for certiorari, the Court goes beyond a mere philosophic inclination to facilitate criminal prosecution: the Court gives the appearance of being not merely the champion, but actually an arm, of the prosecution.[3]

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[3] I express no views about the merits of the issues on which certiorari is now granted. See *Ohio ex rel. Eaton* v. *Price*, 360 U. S. 246 (1959) (statement of BRENNAN, J.).

I realize that, in itself, this order is not a matter of great significance. But even matters of small effect can cloak issues of great moment. In making the specific guarantees of the Bill of Rights a part of our fundamental law, the Framers recognized that limitless state power afflicts the innocent as well as the guilty, that even a crime-free world is not worth the fear and oppression that inevitably follow unrestricted police power, and that a truly free society is one in which every citizen—guilty or innocent—is treated fairly and accorded dignity and respect by the State. Of course, the Framers could not foresee the shape our society would take as the Nation developed. Nor could they foresee how the police function would evolve to keep pace. Rather, it has fallen to this Court—the "ultimate interpreter of the Constitution," *Baker* v. *Carr*, 369 U. S. 186, 211 (1962)—to enforce the rights enshrined in the Bill of Rights and preserve the principles established in 1789. Ours is the duty to prevent encroachment on these principles by overzealous police in the discharge of their great responsibility to prevent crime. Every law-abiding citizen shares with the Court the belief that the prevention of crime is an essential governmental function. However, the Members of this Court have the special responsibility to recognize that, as essential as is the goal of preventing crime, "the Court must be ever mindful of its primary role as the protector of the citizen and not the warden or the prosecutor." *Florida* v. *Meyers*, 466 U. S., at 387 (STEVENS, J., dissenting). This Court has, sadly, lost sight of this role, to the detriment of the rights of each of us. I can only repeat: "One can only hope that this day too will soon pass." *Wainwright* v. *Witt*, 469 U. S., at 463 (BRENNAN, J., dissenting).

No. 85–954. JAPAN WHALING ASSN. ET AL. *v.* AMERICAN CETACEAN SOCIETY ET AL.; and

No. 85–955. BALDRIGE, SECRETARY OF COMMERCE, ET AL. *v.* AMERICAN CETACEAN SOCIETY ET AL. C. A. D. C. Cir. Motion of respondents to expedite consideration of the petitions for writs of certiorari granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Cases are scheduled for oral argument this Term. Reported below: 247 U. S. App. D. C. 309, 768 F. 2d 426.

Certiorari Denied. (See also No. 85–5455, *supra.*)

No. 84–951. GULF COAST CABLE TELEVISION CO. *v.* AFFILIATED CAPITAL CORP. C. A. 5th Cir. Certiorari denied. Reported below: 735 F. 2d 1555 and 741 F. 2d 766.

No. 84-1604. GUZMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 754 F. 2d 482.

No. 84-1800. WALTERS ET AL. *v.* SPRUYTTE. C. A. 6th Cir. Certiorari denied. Reported below: 753 F. 2d 498.

No. 84-6826. WILEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 654.

No. 84-6848. ARAGON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 84-6913. SIMONS *v.* MONTGOMERY COUNTY DEPARTMENT OF POLICE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 30.

No. 84-6981. PAYNE *v.* COUGHLIN ET AL. C. A. 2d Cir. Certiorari denied.

No. 84-6993. LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 1517.

No. 85-137. LAVADO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 750 F. 2d 1527.

No. 85-259. MISLEH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-294. HUDSPETH *v.* NORTH MISSISSIPPI SAVINGS & LOAN ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 2d 1096.

No. 85-329. BRYANT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 2d 370.

No. 85-346. SCHWENDER *v.* DEPARTMENT OF LABOR. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 178.

No. 85-386. PAPPY, KAPLON, VOGEL & PHILLIPS ET AL. *v.* ARAGON. C. A. 9th Cir. Certiorari denied. Reported below: 750 F. 2d 1447.

No. 85-392. SECURITIES INDUSTRY ASSN. *v.* COMPTROLLER OF THE CURRENCY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 244 U. S. App. D. C. 419, 758 F. 2d 739.

No. 85-405. UVIEDO *v.* STEVES SASH & DOOR CO. C. A. 5th Cir. Certiorari denied. Reported below: 738 F. 2d 1425, 753 F. 2d 369, and 760 F. 2d 87.

No. 85–408. QUIVIRA MINING CO. ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. 10th Cir. Certiorari denied. Reported below: 765 F. 2d 126.

No. 85–411. VIVITAR CORP. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 761 F. 2d 1552.

No. 85–431. HUMANA INC. ET AL. *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. D. C. Cir. Certiorari denied. Reported below: 244 U. S. App. D. C. 376, 758 F. 2d 696.

No. 85–438. SIMMONS *v.* INTERSTATE COMMERCE COMMISSION ET AL. (two cases). C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 126 (first case); 766 F. 2d 1177 (second case).

No. 85–445. DEFAZIO ET AL. *v.* CITY OF SPRINGFIELD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 752 F. 2d 1423.

No. 85–456. AMERICAN POSTAL WORKERS UNION, AFL–CIO *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 225, 764 F. 2d 858.

No. 85–469. TOWN OF BELMONT, NEW HAMPSHIRE *v.* DOLE, SECRETARY OF TRANSPORTATION. C. A. 1st Cir. Certiorari denied. Reported below: 766 F. 2d 28.

No. 85–504. LUNDAY-THAGARD CO. *v.* UNITED STATES DEPARTMENT OF THE INTERIOR. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 773 F. 2d 322.

No. 85–508. AVERY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 760 F. 2d 1219 and 767 F. 2d 1494.

No. 85–512. FOSTER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 756 F. 2d 1430.

No. 85–515. GRONOWICZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 764 F. 2d 983.

No. 85–529. HOU HAWAIIANS *v.* HAWAII ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 764 F. 2d 623.

No. 85–562. SPIKA ET AL. *v.* VILLAGE OF LOMBARD, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 763 F. 2d 282.

No. 85–574. THOELE ET AL. *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 766 F. 2d 1053.

No. 85–592. NATURAL GAS PIPELINE COMPANY OF AMERICA *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 247 U. S. App. D. C. 1, 765 F. 2d 1155.

No. 85–601. CURREY *v.* WAFFENSCHMIDT ET UX.; and
No. 85–764. WAFFENSCHMIDT ET AL. *v.* FIRST NATIONAL BANK OF MOUNT VERNON, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 763 F. 2d 711.

No. 85–602. BANKERS & SHIPPERS INSURANCE COMPANY OF NEW YORK *v.* MARSHALL ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 85–603. ESTATE OF SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 1119.

No. 85–604. SCARNATI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 896.

No. 85–613. COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC. *v.* TRAVELERS INSURANCE COS. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 893.

No. 85–653. CITY OF CLEVELAND HEIGHTS, OHIO, ET AL. *v.* SMITH. C. A. 6th Cir. Certiorari denied. Reported below: 760 F. 2d 720.

No. 85–675. FOUR MILLION, TWO HUNDRED FIFTY-FIVE THOUSAND, SIX HUNDRED TWENTY-FIVE DOLLARS AND THIRTY-NINE CENTS ($4,255,625.39), ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 895.

No. 85–681. WESTERN RESERVE OIL & GAS CO., LTD., ET AL. *v.* NEW ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 1428.

No. 85–683. KWANG-WEI HAN *v.* PILATO ET UX. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85–704. CALL ET AL. *v.* CITY OF ALBANY, CALIFORNIA, ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 38 Cal. 3d 633, 699 P. 2d 316.

No. 85–712. JOHN E. KOERNER & CO. ET AL. *v.* PLAINTIFF CLASS REPRESENTATIVES, CORN DERIVATIVES ANTITRUST LITIGATION, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 894.

No. 85–725. MAUGET *v.* KAISER ENGINEERS, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 907.

No. 85–731. SINCLAIR INTERNATIONAL ET AL. *v.* MAXFIELD. C. A. 3d Cir. Certiorari denied. Reported below: 766 F. 2d 788.

No. 85–740. STATE SAVINGS & LOAN ASSN. *v.* FEDERAL HOME LOAN BANK BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 293, 764 F. 2d 926.

No. 85–743. STEWART *v.* SEARS ET AL. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 85–752. MICHAELS ET AL. *v.* MICHAELS. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 1185.

No. 85–753. PENNINGTON, ADMINISTRATOR FOR THE ESTATE OF TORRES *v.* FLOTA MERCANTE GRANCOLOMBIANA, S.A., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1074.

No. 85–754. GREATER BATON ROUGE PORT COMMISSION *v.* JACINTOPORT CORP. C. A. 5th Cir. Certiorari denied. Reported below: 762 F. 2d 435.

No. 85–762. METGE, EXECUTRIX OF THE ESTATE OF METGE, ET AL. *v.* BANKERS TRUST CO. C. A. 8th Cir. Certiorari denied. Reported below: 762 F. 2d 621.

No. 85–763. WHITE *v.* MINNESOTA. Ct. App. Minn. Certiorari denied. Reported below: 369 N. W. 2d 301.

No. 85–768. LEONE ET AL. *v.* PIERCE COUNTY MEDICAL BUREAU ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 932.

No. 85–771. BARON *v.* MELONI, INDIVIDUALLY AND AS SHERIFF OF MONROE COUNTY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 36.

No. 85–772. BROWN *v.* WASHINGTON. Super. Ct. Wash., King County. Certiorari denied.

No. 85–774. PALAZZO *v.* GULF OIL CORP. C. A. 11th Cir. Certiorari denied. Reported below: 764 F. 2d 1381.

No. 85–776. VARNES *v.* FORBES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1167.

No. 85–778. WORRE *v.* DEPARTMENT OF REVENUE OF OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 299 Ore. 444, 703 P. 2d 230.

No. 85–779. KAHN *v.* ALEXANDER GRANT & Co.; and
No. 85–780. TIFFANY INDUSTRIES, INC. *v.* ALEXANDER GRANT & Co. C. A. 8th Cir. Certiorari denied. Reported below: 770 F. 2d 717.

No. 85–788. BOGARAT *v.* EMERSON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 174.

No. 85–789. HIEGEL *v.* HILL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 771 F. 2d 358.

No. 85–795. BENNETT ET AL. *v.* UNITED STATES TRUST COMPANY OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 308.

No. 85–803. TURNER ET AL. *v.* C F & I STEEL CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 43.

No. 85–806. ELLIOTT *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 85–807. OHIO *v.* AKRON AIRPORT POST NO. 8975, VETERANS OF FOREIGN WARS OF THE UNITED STATES. Sup. Ct. Ohio. Certiorari denied. Reported below: 19 Ohio St. 3d 49, 482 N. E. 2d 606.

No. 85–808. GLEASON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 2d 1239.

No. 85–809. PLUMMER *v.* AMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 896.

No. 85–810. MICHIGAN UNITED FOOD & COMMERCIAL WORKERS UNIONS ET AL. *v.* BAERWALDT, COMMISSIONER OF INSURANCE OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 308.

No. 85–811. WILSON ET UX. *v.* SEARS, ROEBUCK & CO. C. A. 8th Cir. Certiorari denied. Reported below: 757 F. 2d 948.

No. 85–812. VANTERPOOL ET UX. *v.* HESS OIL VIRGIN ISLANDS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 766 F. 2d 117.

No. 85–813. MINNESOTA TIMBER PRODUCERS ASSN., INC. *v.* AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 2d 1261.

No. 85–814. KAPLUS *v.* PHILLIPS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 764 F. 2d 807.

No. 85–817. AJAC TRANSMISSION PARTS CORP. ET AL. *v.* TRANSGO, INC. C. A. 9th Cir. Certiorari denied. Reported below: 768 F. 2d 1001.

No. 85–818. BLACK ET AL. *v.* WYCHE. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 472 So. 2d 1195.

No. 85–819. AIR LINE STEWARDS & STEWARDESSES ASSN., LOCAL 550, TWU, AFL–CIO, ET AL. *v.* AMERICAN AIRLINES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 763 F. 2d 875.

No. 85–820. NORWOOD *v.* INA LIFE INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 656.

No. 85–823. GEORGIA DEPARTMENT OF MEDICAL ASSISTANCE *v.* BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 2d 1293.

No. 85–826. GOLIN *v.* BROOKHAVEN NATIONAL LABORATORY. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 135.

No. 85–827. STEVENS ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of San Francisco. Certiorari denied.

No. 85–828. LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1068.

No. 85–829. GEORGE A. CREED & SON, INC. *v.* TRIDENT TECHNICAL COLLEGE ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 286 S. C. 98, 333 S. E. 2d 781.

No. 85–831. HOTEL & RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 28 *v.* SERITIS ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85–832. WHITTAKER CORP. *v.* OLYMPIC SPORTS PRODUCTS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 910.

No. 85–835. MORTON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85–836. GEL SPICE CO., INC., ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 773 F. 2d 427.

No. 85–837. KARAPINKA *v.* UNION CARBIDE CORP. C. A. 2d Cir. Certiorari denied.

No. 85–838. KARAM, SPECIAL ADMINISTRATRIX OF THE ESTATE OF KARAM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1167.

No. 85–839. LACHICA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1174.

No. 85–841. CURRIE ET AL. *v.* BARRY, MAYOR OF THE DISTRICT OF COLUMBIA, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 85–842. CITY OF DES MOINES, IOWA, ET AL. *v.* MOORE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 2d 343.

No. 85–852. PRESTON CARROLL CO., INC., ET AL. *v.* MORRISON ASSURANCE CO. Sup. Ct. Ga. Certiorari denied. Reported below: 254 Ga. 608, 331 S. E. 2d 520.

No. 85–864. DA-CHUAN ZHENG ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 768 F. 2d 518.

No. 85–853. MCLAIN, SHERIFF, LINCOLN COUNTY, OKLAHOMA *v.* WALKER. C. A. 10th Cir. Certiorari denied. Reported below: 768 F. 2d 1181.

No. 85–866. HOLMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 764 F. 2d 763.

No. 85–880. DIRECTORY SERVICE COMPANY OF COLORADO, INC., ET AL. *v.* ROCKFORD MAP PUBLISHERS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 145.

No. 85–893. HUNT ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 2d 161.

No. 85–903. CERTAIN UNNAMED PROSPECTIVE DEFENDANTS *v.* NEWSPAPERS, INC., ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 124 Wis. 2d 499, 370 N. W. 2d 209.

No. 85–905. SALISBURY *v.* JAMES RIVER CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85–906. IN RE MARTIN-TRIGONA. C. A. 2d Cir. Certiorari denied. Reported below: 763 F. 2d 140.

No. 85–909. NAMENWIRTH *v.* BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM. C. A. 7th Cir. Certiorari denied. Reported below: 769 F. 2d 1235.

No. 85–911. MARTY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 2d 1351.

No. 85–915. LAW FIRM OF DANIEL P. FOSTER, P. C. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 35.

No. 85–916. LAW FIRM OF DANIEL P. FOSTER, P. C. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 35.

No. 85–923. MILLS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 764 F. 2d 373.

No. 85–931. KIRKLEY *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 470 So. 2d 1001.

No. 85–932. MARIN ET AL. *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 769 F. 2d 590.

No. 85-933. CARROLLO ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 770 F. 2d 744.

No. 85-939. RAMIE *v.* CITY OF HEDWIG VILLAGE, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 490.

No. 85-943. MALLET *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 779 F. 2d 44.

No. 85-947. SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA *v.* MANECKE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 912.

No. 85-957. VIGNES *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 85-962. HERSHEY *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 20 M. J. 433.

No. 85-963. HOLMAN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 149.

No. 85-981. CONTACT LENS MANUFACTURERS ASSN. *v.* FOOD AND DRUG ADMINISTRATION OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. D. C. Cir. Certiorari denied. Reported below: 247 U. S. App. D. C. 102, 766 F. 2d 592.

No. 85-996. HILBMANN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 779 F. 2d 44.

No. 85-5011. BARRIENTOS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 758 F. 2d 1152.

No. 85-5013. DARWIN *v.* RISON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 285.

No. 85-5100. ALDRIDGE *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 63.

No. 85-5205. COCHRAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 1118.

No. 85-5227. GARMANY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 929.

No. 85–5234. BEZOLD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 999.

No. 85–5240. PRICE *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85–5248. SCOTT *v.* ROCKVIEW STATE CORRECTIONAL INSTITUTION ET AL. C. A. 3d Cir. Certiorari denied.

No. 85–5293. PERPIGNAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 438.

No. 85–5302. SAWYER *v.* FULCOMER, SUPERINTENDENT, STATE INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 85–5307. KABONGO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1012.

No. 85–5350. STAUFFER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 763 F. 2d 202.

No. 85–5362. DUNLAP *v.* MASSEY, SUPERINTENDENT, UNION CORRECTIONAL INSTITUTION, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 152.

No. 85–5371. CORBETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85–5380. JACKSON *v.* GENERAL DYNAMICS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 761 F. 2d 693.

No. 85–5439. JOHNSON *v.* MANSON, COMMISSIONER OF CORRECTIONS OF CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 196 Conn. 309, 493 A. 2d 846.

No. 85–5449. DUNBAR *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 85–5467. LOPES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 150.

No. 85–5481. BARKER *v.* MORRIS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 761 F. 2d 1396.

No. 85–5502. DOE ET AL. *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 103 N. M. 177, 704 P. 2d 431.

No. 85–5512. GRAVES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 490 A. 2d 1086.

No. 85–5520. TREADWELL, AKA BARRY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 245 U. S. App. D. C. 257, 760 F. 2d 327.

No. 85–5522. REEVES *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 757 F. 2d 283.

No. 85–5532. CAMPMAN *v.* UNITED STATES; and
No. 85–5543. STREETER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 171.

No. 85–5546. MCKNIGHT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 152.

No. 85–5565. LUNDIEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 769 F. 2d 981.

No. 85–5572. ROYSTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 1491.

No. 85–5594. PETTY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 111 App. Div. 2d 96, 489 N. Y. S. 2d 811.

No. 85–5615. BROWN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 770 F. 2d 241.

No. 85–5617. AMADI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 908.

No. 85–5653. OWENS *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS. C. A. 3d Cir. Certiorari denied. Reported below: 774 F. 2d 1152.

No. 85–5656. MCQUEEN *v.* U. S. DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION. C. A. 11th Cir. Certiorari denied.

No. 85–5679. PASKULY *v.* MARSHALL FIELD & CO. C. A. 7th Cir. Certiorari denied.

No. 85–5700. CODY *v.* DE IORIO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1067.

No. 85–5703. KEARSON *v.* SOUTHERN BELL TELEPHONE & TELEGRAPH CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 405.

No. 85–5707. GERINGER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85–5712. BALTEZORE *v.* CONCORDIA PARISH SHERIFF'S DEPARTMENT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 202.

No. 85–5715. TINKER-BEY *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 85–5717. WALKER *v.* PRISONER REVIEW BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 769 F. 2d 396.

No. 85–5718. ST. AMAND *v.* JONES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 934.

No. 85–5720. WILSON *v.* MCMACKIN. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 53.

No. 85–5723. FULLER *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 774 F. 2d 1154.

No. 85–5724. DAY *v.* AMOCO CHEMICALS CORP. C. A. 5th Cir. Certiorari denied.

No. 85–5725. GENTSCH *v.* ROBERSON ET AL. C. A. 5th Cir. Certiorari denied.

No. 85–5726. BERNARD *v.* NICKELS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 2d 159.

No. 85–5730. SHAFFER-CORONA *v.* DISTRICT OF COLUMBIA TEACHERS FEDERAL CREDIT UNION. Ct. App. D. C. Certiorari denied.

No. 85–5735. WESTFALL *v.* SUPREME COURT OF APPEALS OF WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 85–5738. COSSETT ET AL. *v.* LEDFORD, TRUSTEE. C. A. 6th Cir. Certiorari before judgment denied.

No. 85–5746. MITCHELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 769 F. 2d 1544.

No. 85–5748. WEST *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 771 F. 2d 910.

No. 85–5752. RICHARDS *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 908.

No. 85–5753. LIPSMAN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 616, 485 N. E. 2d 243.

No. 85–5756. GEISON *v.* FIRESTONE, SECRETARY OF STATE OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 174.

No. 85–5757. CARROLL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 101 Ill. 2d 590.

No. 85–5763. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 772 F. 2d 903.

No. 85–5764. SELLNER *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 303 Md. 42, 491 A. 2d 1197.

No. 85–5765. HARRISON *v.* MCDADE. Sup. Ct. Ga. Certiorari denied. Reported below: 254 Ga. XXIII, 332 S. E. 2d 659.

No. 85–5766. GREEN *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 296 Md. 172.

No. 85–5767. HOLSEY *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 303 Md. 683, 496 A. 2d 682.

No. 85–5769. EVANS *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 85–5775. FELDER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 85–5777. PARKER *v.* FAIRMAN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1168.

No. 85–5778. ROSS *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 693 S. W. 2d 191.

No. 85–5779. POOLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 773 F. 2d 1237.

No. 85–5782. LOJUK *v.* JOHNSON. C. A. 7th Cir. Certiorari denied. Reported below: 770 F. 2d 619.

No. 85–5783. KNIGHT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 768.

No. 85–5785. REDDICK *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 197 Conn. 115, 496 A. 2d 466.

No. 85–5788. DANIEL *v.* UNITED STATES PARCEL SERVICE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 85–5789. CANNIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 2d 1351.

No. 85–5791. MYRICK *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 3d Cir. Certiorari denied.

No. 85–5796. IVY *v.* REED, FORMER WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 85–5797. AHMED *v.* HUGHES AIRCRAFT CO. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 169.

No. 85–5798. HENNESSY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 85–5801. BUNCH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1076.

No. 85–5804. HUNTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 1000.

No. 85–5806. CHANEY *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 304 Md. 21, 497 A. 2d 152.

No. 85–5807. LUCIEN *v.* CHRANS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 85–5808. STANFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 772 F. 2d 901.

No. 85–5809. BUCKLEY *v.* COMMERCIAL FEDERAL SAVINGS & LOAN ET AL. C. A. 8th Cir. Certiorari denied.

No. 85–5810. HOOKS *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85–5811. ANDERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 53.

No. 85–5813. SHABAZZ *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 85–5814. OLIVA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 136.

No. 85–5816. GRAEWE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 763 F. 2d 1504 and 774 F. 2d 106.

No. 85–5817. ALLEN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 85–5820. JONES *v.* BROWN, FORMER GOVERNOR OF KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 51.

No. 85–5826. BUSBY *v.* HOLT, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 771 F. 2d 1461.

No. 85–5827. KNIGHT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85–5828. GONZALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 1393.

No. 85–5832. MCCALLISTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 915.

No. 85–5834. SMITH *v.* CITY OF OMAHA, NEBRASKA, ET AL. Sup. Ct. Neb. Certiorari denied. Reported below: 220 Neb. 217, 369 N. W. 2d 67.

No. 85–5836. DEVAN *v.* CITY OF DES MOINES, IOWA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 423.

No. 85–5837. CAMERON *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 74 Ore. App. 367, 704 P. 2d 553.

No. 85–5839. GRAY *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1059.

No. 85–5841. TOOMEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 764 F. 2d 678.

No. 85–5842. VARGAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1175.

No. 85–5848. GRAEWE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 763 F. 2d 1504 and 774 F. 2d 106.

No. 85–5849. LOVETT *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 85–5851. KENDRICKS *v.* BROWN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1071.

No. 85–5860. HOLLEMAN *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 770 F. 2d 690.

No. 85–5889. RISPOLI *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 35.

No. 85–5924. MULLINS *v.* NEWSOME, SUPERINTENDENT, GEORGIA STATE PRISON. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 917.

No. 85–5968. COOPER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 931.

No. 84–1287. LIPHETE ET AL. *v.* STIERHEIM ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. JUSTICE MARSHALL and JUSTICE BLACKMUN would grant certiorari. Reported below: 455 So. 2d 1348.

No. 84–1745. SCHILLING, COMMISSIONER OF SAVINGS AND LOAN ASSOCIATIONS FOR ILLINOIS *v.* TELEGRAPH SAVINGS &

LOAN ASSOCIATION OF CHICAGO ET AL. Sup. Ct. Ill. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 105 Ill. 2d 166, 473 N. E. 2d 921.

No. 85–332. PARISH OF ST. BERNARD ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN and JUSTICE O'CONNOR would grant certiorari. Reported below: 756 F. 2d 1116.

No. 85–334. FIRESTONE TIRE & RUBBER CO. ET AL. *v.* UNITED STATES; and

No. 85–376. ETHYL CORP. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 761 F. 2d 1153.

No. 85–391. YOUNG *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 286 Ark. 413, 692 S. W. 2d 752.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

Arkansas Stat. Ann. § 41–1812 (1977) provides, in pertinent part, that "[a] person commits indecent exposure if, with purpose to arouse or gratify the sexual desire of himself or of any other person, he exposes his sex organs . . . in a public place or public view . . . ."* Petitioner was a nude dancer at D.L.'s Darkroom, a tavern in Little Rock, Arkansas. Along with nearly every other nude dancer in the metropolitan area, petitioner was arrested in one of two "sweep" operations conducted in February 1984. At a bench trial, an undercover police officer testified that once during her dance, petitioner touched her breasts, and then touched the inside of her thighs. At no time did petitioner expose her vaginal area or touch her genitals. The Municipal Court convicted petitioner for indecent exposure under § 41–1812, fined her $700, and gave her a 30-day suspended sentence.

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*Arkansas Stat. Ann. § 41–1812 (1977) provides in full as follows:

"Indecent exposure. (1) A person commits indecent exposure if, with purpose to arouse or gratify the sexual desire of himself or of any other person, he exposes his sex organs:

"(a) in a public place or public view; or

"(b) under circumstances in which he knows his conduct is likely to cause affront or alarm.

"(2) Indecent exposure is a class A misdemeanor."

The Pulaski County Circuit Court conducted a trial *de novo* on appeal. The court held that mere nude dancing violated the statute, and rejected petitioner's First Amendment defense on the grounds that her nude dancing had no articulated message. Pet. for Cert. 13–14. The court affirmed petitioner's conviction, and imposed a 1-year suspended sentence on the condition that she not "display herself in a public place . . . ." App. to Pet. for Cert. 8–a.

The Arkansas Supreme Court affirmed, both on the ground that petitioner's conduct violated the statute and because such behavior was not protected by the First Amendment. 286 Ark. 413, 692 S. W. 2d 752 (1985). With respect to the statutory argument, the court noted that § 41–1812 was intended to cover both nude dancing and "'flashers.'" *Id.*, at 415, 692 S. W. 2d, at 753. Turning to petitioner's constitutional argument, the court "d[id] not take issue" with petitioner's contention that "'mere nude dancing'" is entitled to First Amendment protection, but found under the facts of this case that petitioner's conduct "was not simply nudity . . . ." *Id.*, at 417, 692 S. W. 2d, at 754. Instead, "while dancing [petitioner] ran her hand over her breast, down over her stomach and rubbed herself on the inner thigh below the vaginal area." *Ibid.* Because petitioner did not argue that such conduct is constitutionally protected, the court did not address the remaining aspects of her constitutional argument. *Ibid.*

Petitioner maintains that, as applied to mere nude dancing, § 41–1812 is overbroad and substantially abridges First Amendment rights. Regardless of whether and how petitioner might have touched herself during her performance, she has standing to raise this overbreadth challenge. See *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947, 958–959 (1984); *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 633–635 (1980); *Broadrick* v. *Oklahoma*, 413 U. S. 601, 611–612 (1973).

In *New York State Liquor Authority* v. *Bellanca*, 452 U. S. 714 (1981) and *California* v. *LaRue*, 409 U. S. 109 (1972), the Court held that States may regulate nude dancing in establishments licensed to serve liquor by virtue of the power conferred under the Twenty-first Amendment. In both cases, however, the Court intimated that statutes which seek to regulate nude dancing in public places other than bars and taverns might contravene the dictates of the First Amendment, as this form of entertainment

might be entitled to constitutional protection. *New York State Liquor Authority* v. *Bellanca*, *supra*, at 718; *California* v. *LaRue*, *supra*, at 118. Indeed, in *Schad* v. *Mount Ephraim*, 452 U. S. 61, 66 (1981), the Court expressly stated that "nude dancing is not without its First Amendment protections from official regulation." See also *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 933–934 (1975); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 557–558 (1975).

Given these repeated indications that barroom-type nude dancing is a type of expression that is protected under the First Amendment under some circumstances, the Court should grant the petition for certiorari in this case in order to explore the propriety of Arkansas' regulation. Section 41–1812 does not prohibit nudity only in establishments possessing liquor licenses. Instead, it criminalizes nonobscene nudity in any public place so long as its purpose is to gratify the sexual desires of another person. Arkansas thus cannot rely on the Twenty-first Amendment as a sufficient basis to justify its statute, and instead, must demonstrate a compelling state interest sufficient to prohibit the exercise of a protected form of expression. See *Doran* v. *Salem Inn, Inc.*, *supra*, at 933–934; *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968).

In his dissent in *New York State Liquor Authority* v. *Bellanca*, *supra*, JUSTICE STEVENS noted that "[a]lthough the Court has written several opinions implying that nude or partially nude dancing is a form of expressive activity protected by the First Amendment, the Court has never directly confronted the question." *Id.*, at 718–719. I believe it is time to do so. The state courts are in disagreement over the reach of the First Amendment in this area. See generally Barbre, Topless or Bottomless Dancing or Similar Conduct as Offense, 49 A.L.R. 3d 1084, §§ 3, 5 (1973 and Supp. 1985) (collecting cases). In addition, this case does not present the complications of local police power over zoning, as found in *Schad* v. *Mount Ephraim*, *supra*, or the question of States' rights under the Twenty-first Amendment present in *California* v. *LaRue*, *supra*, *Doran* v. *Salem Inn, Inc.*, *supra*, and *New York State Liquor Authority* v. *Bellanca*, *supra*.

For these reasons, I would grant the petition for certiorari.

No. 85–555. BANKERS TRUST CO. *v.* METGE, EXECUTRIX OF THE ESTATE OF METGE, ET AL. C. A. 8th Cir. Motion of Amer-

ican Bankers Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 762 F. 2d 621.

No. 85–702. MADRID ET AL. *v.* MONTELONGO ET AL. C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 765 F. 2d 1353.

No. 85–816. CONNECTICUT *v.* SUTTON. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 197 Conn. 485, 498 A. 2d 65.

No. 85–894. MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* LYONS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 770 F. 2d 529.

No. 85–881. AUSTIN *v.* TENNESSEE. Ct. Crim. App. Tenn.;
No. 85–5058. PENRY *v.* TEXAS. Ct. Crim. App. Tex.;
No. 85–5126. HATCH *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 85–5705. HOOPER *v.* ARIZONA. Sup. Ct. Ariz.;
No. 85–5844. SMITH *v.* MONTANA. Sup. Ct. Mont.;
No. 85–5846. CARTWRIGHT *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 85–5867. MARTIN *v.* OHIO. Sup. Ct. Ohio; and
No. 85–5880. JONES *v.* SMITH, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: No. 85–5058, 691 S. W. 2d 636; No. 85–5126, 701 P. 2d 1039; No. 85–5705, 145 Ariz. 538, 703 P. 2d 482; No. 85–5844, —— Mont. —— and ——, 705 P. 2d 1087 and 1110; No. 85–5846, 708 P. 2d 592; No. 85–5867, 19 Ohio St. 3d 122, 483 N. E. 2d 1157; No. 85–5880, 772 F. 2d 668.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85–5815. ADAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 764 F. 2d 1356.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Because the Court's refusal to grant certiorari in this case allows the State of Florida to proceed with the execution of a defendant whose conviction may well rest upon a ground that the Florida Supreme Court has held invalid, I must dissent from the denial here.

Since *Stromberg* v. *California*, 283 U. S. 359 (1931), this Court has recognized that "a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." *Zant* v. *Stephens*, 462 U. S. 862, 881 (1983). See *Chiarella* v. *United States*, 445 U. S. 222, 237, n. 21 (1980); *Leary* v. *United States*, 395 U. S. 6, 31–32 (1969). Although in *Stromberg*, the Court was concerned that the jury might have held the defendant criminally liable for conduct protected by the First Amendment, the rationale of that decision should not be limited to cases in which a general verdict may be based upon a ground repugnant to the Federal Constitution. Where a jury has been instructed that it may convict a defendant upon an invalid ground, the reason for that invalidity is not important. See *Chiarella* v. *United States*, *supra*, at 237, n. 21 ("We may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct"). What offends the Due Process Clause is the possibility that the jury may have condemned the defendant for reasons that as a matter of law—be it statutory or constitutional—cannot support the verdict. The existence of such a possibility is all too real in this case and demands that petitioner's conviction be set aside.

Petitioner was arrested and charged with the murder of an 8-year-old girl. In statements to the police, he admitted removing the victim's clothes, using rope to tie her hands, and placing plastic bags over her body. He said he thought he had tried to have sexual relations with the victim but either could not do it or could

not bring himself to do it. 764 F. 2d 1356, 1358 (CA11 1985). The indictment brought against petitioner alleged that he had "murdered the victim, unlawfully, from a premeditated design by strangling." *Adams* v. *State*, 412 So. 2d 850, 852 (Fla. 1982). The circumstances of the crime might easily have led jurors to believe that even if petitioner had not premeditated the homicide, he nevertheless had killed the girl in the course of an attempted rape. Under state law, such a felony-murder theory was not foreclosed by the indictment, *ibid.*, and it does not appear that the prosecution ever indicated its intention to rely solely upon a theory of premeditated murder.

The trial court's instruction made clear the availability of either felony murder or premeditated murder as a basis for a first-degree murder conviction. At the close of trial, the court instructed the jury that it would not have to find that petitioner had a "premeditated design to kill" in order to convict him of first-degree murder. The court explained:

> "The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree, even though there is no premeditated design or intent to kill.
>
> "If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, or while escaping from the immediate scene of such crime the killing is in the perpetration of or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree." *Ibid.*

The jury proceeded to convict petitioner of first-degree murder. Long before petitioner's trial, however, the Florida Supreme Court had held the statutory term "crime against nature" too vague to sustain a conviction. *Franklin* v. *State*, 257 So. 2d 21 (Fla. 1971). Indeed, in affirming petitioner's conviction, the Florida Supreme Court admitted that the instruction here "included references to two crimes which do not exist, to wit: rape and an abominable and detestable crime against nature." 412 So. 2d, at 852. Were it possible, therefore, that in reaching their general verdict the jury relied on a felony-murder theory based upon the

sexual aspects of the killing, the conviction unquestionably would have to be overturned under *Stromberg*.

Finding no such possibility, the Court of Appeals affirmed the District Court's refusal to grant petitioner's habeas petition. The Court of Appeals concluded:

> "The trial court's reference to the capital felony of killing during the commisssion of or an attempt to commit rape, a crime against nature, or kidnapping as murder in the first degree appears early in the instructions as part of what were, in essence, statutory definitions. The actual and controlling charge came later in the instructions, when the trial court told the jurors that, if the elements of homicide were found, their next task would be to determine its degree. At this point, premeditated murder was the only killing stated to constitute murder in the first degree. Therefore, the jurors were actually instructed to consider only premeditated murder as murder in the first degree." 764 F. 2d, at 1362–1363.

I cannot accept the Court of Appeals' distinction between the "statutory" section of the trial court's instructions and the later, "controlling" part. Although the trial court's focus on premeditated murder came in the context of its "summary" of the entire charge, the jury can hardly be presumed to have forgotton the lengthy explanation of first-degree murder that had come before. The sexual overtones of the crime make it impossible to eliminate the possibility that the jury seized upon the references to rape and "crime against nature" and made them dispositive here. So long as such a possibility exists, *Stromberg* requires that petitioner's conviction be set aside.

This Court's refusal to grant certiorari in *Dobbert* v. *Wainwright*, 468 U. S. 1231 (1984), a case raising a *Stromberg* claim very similar to the one here, might have been attributed to the majority's belief that the constitutional claim there had not been properly preserved. *Id.*, at 1244–1246 (MARSHALL, J., dissenting from denial of stay of execution and of certiorari). No such procedural bar exists here, and the Court's refusal to consider petitioner's claims is even less excusable. I dissent.

No. 85–5843. ROVETUSO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 768 F. 2d 809.

Rehearing Denied

No. 84-6717. HOLSEY *v.* MARYLAND, *ante*, p. 1004;

No. 85-56. CONNOR *v.* UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, *ante*, p. 998;

No. 85-130. CALIFORNIA STATE BOARD OF EQUALIZATION ET AL. *v.* CHEMEHUEVI INDIAN TRIBE, *ante*, p. 9;

No. 85-191. ZERMAN ET AL. *v.* AVANT GARDE CONDOMINIUM ASSN., INC., ET AL.; and ZERMAN *v.* WHITE, CLERK OF THE FLORIDA SUPREME COURT, ET AL., *ante*, p. 895;

No. 85-222. BAKER, INDIVIDUALLY AND DBA BAKER COAL CO. *v.* UNITED STATES, *ante*, p. 945;

No. 85-263. MAGGETTE *v.* COOK COUNTY POLICE AND CORRECTIONS MERIT BOARD ET AL., *ante*, p. 945;

No. 85-269. NABORS *v.* UNITED STATES, *ante*, p. 851;

No. 85-287. COURT HOUSE PLAZA CO. *v.* CITY OF PALO ALTO ET AL., *ante*, p. 945;

No. 85-318. EL SHAHAWY *v.* ELLIOTT, *ante*, p. 980;

No. 85-374. DENSON *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES, *ante*, p. 946;

No. 85-378. ROBERTS ET AL. *v.* SIMPSON, EXECUTRIX OF THE ESTATE OF BEEL, ET AL., *ante*, p. 946;

No. 85-439. CALIFORNIA EX REL. COOPER, CITY ATTORNEY OF SANTA ANA, CALIFORNIA *v.* MITCHELL BROTHERS' SANTA ANA THEATER ET AL., *ante*, p. 948;

No. 85-582. SPARROW *v.* DEVINE, DIRECTOR, U. S. OFFICE OF PERSONNEL MANAGEMENT, ET AL., *ante*, p. 949;

No. 85-5107. BURTON *v.* REED ET AL., *ante*, p. 949;

No. 85-5351. DANO *v.* SZOMBATHY, *ante*, p. 950;

No. 85-5361. COLEMAN ET AL. *v.* DELAWARE ET AL., *ante*, p. 950;

No. 85-5376. HOLLIDAY *v.* HAUPTMAN, TRUSTEE IN BANKRUPTCY, *ante*, p. 950;

No. 85-5378. BISHOP *v.* DAVIS, *ante*, p. 950;

No. 85-5471. HOWELL *v.* MARYLAND, *ante*, p. 996;

No. 85-5495. MCGLORY *v.* YOKA, *ante*, p. 997;

No. 85-5504. IN RE SCHMID, *ante*, p. 993;

No. 85-5508. HADDIX *v.* OHIO LIQUOR CONTROL COMMISSION, *ante*, p. 997;

No. 85-5510. BURTON *v.* WILSON ET AL., *ante*, p. 997; and

No. 85-5511. BURTON *v.* SMITH, *ante*, p. 997. Petitions for rehearing denied.

No. 84–6742. BAILEY ET AL. *v.* BUCKEYE CELLULOSE CORP., *ante*, p. 863. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 85–17. VERNON *v.* MAGGIO, WARDEN, *ante*, p. 945. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 85–5041. CHANDLER *v.* LORD, *ante*, p. 853. Motion for leave to file petition for rehearing denied.

No. 85–5316. WILSON *v.* UNITED STATES ET AL., *ante*, p. 921. Motion of petitioner for leave to file petition for rehearing out of time denied.

JANUARY 18, 1986

Dismissal Under Rule 53

No. 85–173. KEY INTERNATIONAL MANUFACTURING, INC. *v.* MORSE/DIESEL, INC., ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 762 F. 2d 990.

JANUARY 21, 1986

Affirmed on Appeal

No. 85–714. TEXAS ET AL. *v.* UNITED STATES. Affirmed on appeal from D. C. W. D. Tex.

Certiorari Granted—Vacated and Remanded

No. 84–1706. PACYNA *v.* MARSH, SECRETARY OF THE ARMY. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals to transfer the case pursuant to 28 U. S. C. § 1631 to the United States Court of Appeals for the Federal Circuit. See 28 U. S. C. § 1295(a)(2). Reported below: 751 F. 2d 374.

No. 84–1750. BALLAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals to transfer the case pursuant to 28 U. S. C. § 1631 to the United States Court of Appeals for the Federal Circuit. See 28 U. S. C. § 1295(a)(2). Reported below: 747 F. 2d 915.

Miscellaneous Orders

No. A–483. SCHUCHMAN ET UX. *v.* UNITED STATES. D. C. S. D. Ill. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–522. IN RE DISBARMENT OF KAMINSKY. Disbarment entered. [For earlier order herein, see *ante*, p. 896.]

No. D–532. IN RE DISBARMENT OF HEFNER. Disbarment entered. [For earlier order herein, see *ante*, p. 992.]

No. D–536. IN RE DISBARMENT OF LOVETT. It is ordered that Lee Gilson Lovett, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–542. IN RE DISBARMENT OF BOWLES. It is ordered that Robert William Bowles, Jr., of Orlando, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–543. IN RE DISBARMENT OF DEGLOW. It is ordered that Riner Ernest Deglow, of Spokane, Wash., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 84–902. WARDAIR CANADA INC. *v.* FLORIDA DEPARTMENT OF REVENUE. Sup. Ct. Fla. [Probable jurisdiction noted, *ante*, p. 943.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Aer Lingus et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied.

No. 84–1903. POSADAS DE PUERTO RICO ASSOCIATES, DBA CONDADO HOLIDAY INN *v.* TOURISM COMPANY OF PUERTO RICO ET AL. Sup. Ct. P. R. [Probable jurisdiction postponed, *ante*, p. 917.] Motion of Association of National Advertisers, Inc., for leave to file a brief as *amicus curiae* granted.

No. 84–2030. BROWN-FORMAN DISTILLERS CORP. *v.* NEW YORK STATE LIQUOR AUTHORITY. Ct. App. N. Y. [Probable

jurisdiction noted, *ante*, p. 814.] Motion of Wine & Spirits Wholesalers of America, Inc., for leave to file a brief as *amicus curiae* granted. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

No. 85-21. SQUARE D CO. ET AL. *v.* NIAGARA FRONTIER TARIFF BUREAU, INC., ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 815.] Motions of Association of American Railroads, American Information Technologies Corp. et al., and National Motor Freight Traffic Association, Inc., et al. for leave to file briefs as *amici curiae* granted.

No. 85-93. BAZEMORE ET AL. *v.* FRIDAY ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 978.] Motion of National Committee on Pay Equity et al. for leave to file a brief as *amici curiae* granted.

No. 85-195. ICICLE SEAFOODS, INC. *v.* WORTHINGTON ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 900.] Motion of Maryland Casualty Co. for leave to file a brief as *amicus curiae* granted.

No. 85-390. CITY OF LOS ANGELES ET AL. *v.* PREFERRED COMMUNICATIONS, INC. C. A. 9th Cir. [Certiorari granted, *ante*, p. 979.] Motions for leave to file briefs as *amici curiae* filed by the following are granted: UNDA-USA, National Catholic Association for Broadcasters & Allied Communicators; Office of Communication of United Church of Christ et al.; National Association of Broadcasters; Mountain States Telephone & Telegraph Co. et al.; Wisconsin Bell, Inc.; and National Federation of Cable Programmers et al.

No. 85-1085. AFRO-AMERICAN POLICE ASSN., INC., ET AL. *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioners to expedite consideration of this case denied.

No. 85-5404. ALLEN *v.* ILLINOIS. Sup. Ct. Ill. [Certiorari granted, *ante*, p. 979.] Motion of Mental Health Information Service, Second Judicial Department, for leave to file a brief as *amicus curiae* granted.

Certiorari Granted

No. 85-495. ANSONIA BOARD OF EDUCATION ET AL. *v.* PHILBROOK ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 757 F. 2d 476.

No. 85–5915. WRIGHT ET AL. *v.* CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY. C. A. 4th Cir. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 771 F. 2d 833.

Certiorari Denied

No. 85–513. KENDALL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 766 F. 2d 1426.

No. 85–526. LOVE ET AL. *v.* UNITED STATES; and
No. 85–576. LEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 1052.

No. 85–549. CALIFORNIA *v.* CALLAHAN. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 168 Cal. App. 3d 631, 214 Cal. Rptr. 294.

No. 85–573. PUBLIC SERVICE COMPANY OF COLORADO *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 754 F. 2d 1555.

No. 85–598. GRUMMAN OHIO CORP. ET AL. *v.* CITY OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 108 App. Div. 2d 1105, 487 N. Y. S. 2d 242.

No. 85–614. TAYLOR *v.* LOCAL 980, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURE IMPLEMENT WORKERS OF AMERICA. C. A. 3d Cir. Certiorari denied. Reported below: 761 F. 2d 931.

No. 85–625. NORTHERN CALIFORNIA RETAIL CLERKS UNION & FOOD EMPLOYERS JOINT PENSION TRUST FUND *v.* AWARD SERVICE, INC. C. A. 9th Cir. Certiorari denied. Reported below: 763 F. 2d 1066.

No. 85–654. HURVITZ *v.* DIVISION OF MEDICAL QUALITY, BOARD OF MEDICAL QUALITY ASSURANCE, DEPARTMENT OF CONSUMER AFFAIRS OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85–666. ALLBRITTON COMMUNICATIONS CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 766 F. 2d 812.

No. 85–668. WHEELER ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 768 F. 2d 1333.

No. 85–674. KENTON MEADOWS CO., INC., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 766 F. 2d 142.

No. 85–685. ESCHLER ET AL. *v.* BOEING CO.; and
No. 85–703. SCHOENBORN ET AL. *v.* BOEING CO. C. A. 3d Cir. Certiorari denied. Reported below: 769 F. 2d 115.

No. 85–691. RAMSEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 761 F. 2d 603.

No. 85–706. LOMBARD'S INC. *v.* PRINCE MANUFACTURING, INC. C. A. 11th Cir. Certiorari denied. Reported below: 753 F. 2d 974.

No. 85–716. VEAL *v.* DEROBERTIS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 926.

No. 85–718. AMERICAN METHYL CORP. *v.* MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 247 U. S. App. D. C. 268, 768 F. 2d 385.

No. 85–724. MANDANICI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 158.

No. 85–734. BRESSLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 287.

No. 85–748. KELLER *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 182.

No. 85–761. BORYS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 766 F. 2d 304.

No. 85–802. JOHN HOLMAN & SONS, LTD., ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO (CORREIA ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85–824. NATIONAL RIFLE ASSOCIATION OF AMERICA ET AL. *v.* MINNESOTA STATE ETHICAL PRACTICES BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 761 F. 2d 509.

No. 85–856. FIDELITY & CASUALTY COMPANY OF NEW YORK *v.* PHILADELPHIA RESINS CORP. C. A. 10th Cir. Certiorari denied. Reported below: 766 F. 2d 440.

No. 85–870. METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ET AL. *v.* KELLEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 773 F. 2d 677.

No. 85–872. SCHOR ET AL. *v.* CONTICOMMODITY SERVICES, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 248 U. S. App. D. C. 155, 770 F. 2d 211.

No. 85–887. BASIN ELECTRIC POWER COOPERATIVE *v.* MIDWEST PROCESSING CO. C. A. 8th Cir. Certiorari denied. Reported below: 769 F. 2d 483.

No. 85–892. OHLE ET AL. *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 343 Pa. Super. 611, 494 A. 2d 480.

No. 85–901. SHEFFER ET AL. *v.* MALLONN, AUDITOR, CITY OF CANTON, OHIO, ET AL. Ct. App. Ohio, Stark County. Certiorari denied.

No. 85–910. WHITEHEAD *v.* SOUTHERN RAILWAY CO. Ct. App. Ky. Certiorari denied.

No. 85–919. GILLESPIE *v.* WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 771 F. 2d 1035.

No. 85–921. CARL E. WIDELL & SONS *v.* ELLISON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 894.

No. 85–5127. LAWRENCE *v.* CUNNINGHAM, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 85–5147. HAYNES *v.* VERDEYEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 647.

No. 85–5163. CARR *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 85–5264. THORNTON *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 85–5437. MORA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 768 F. 2d 1197.

No. 85–5535. WRIGHT *v.* BOURBEAU ET AL. App. Ct. Conn. Certiorari denied. Reported below: 3 Conn. App. 512, 490 A. 2d 522.

No. 85–5600. BROWN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 85–5610. PRUITT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 1256.

No. 85–5619. CAMPBELL *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1059.

No. 85–5625. SAKELLAR *v.* LOCKHEED MISSILES & SPACE CO. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 1453.

No. 85–5628. DODSON *v.* COOPER, SUPERINTENDENT, SHADOW MOUNTAIN CORRECTIONAL FACILITY. Sup. Ct. Colo. Certiorari denied. Reported below: 705 P. 2d 500.

No. 85–5633. CALPIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 916.

No. 85–5830. ARNEY ET AL. *v.* BLACK ET AL. C. A. 10th Cir. Certiorari denied.

No. 85–5838. HAYES *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 131 Ill. App. 3d 1166, 493 N. E. 2d 1224.

No. 85–5840. GLICK *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 770 F. 2d 737.

No. 85–5847. BROWN *v.* WOODS ET AL. Ct. App. Ga. Certiorari denied.

No. 85–5850. LILLARD *v.* GREER, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1050.

No. 85–5854. HUGHS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 1171.

No. 85–5855. CRAWFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1175.

No. 85–5856. GOODWIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 770 F. 2d 631.

No. 85–5857. DAMPIER *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1168.

No. 85–5861. BAXTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1175.

No. 85–5862. CHINDAWONGSE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 771 F. 2d 840.

No. 85–5863. FLOWERS *v.* GENERAL MOTORS CORP., BUICK MOTOR DIVISION. Sup. Ct. Mich. Certiorari denied. Reported below: 422 Mich. 912.

No. 85–5864. BRANCEWICZ *v.* C. E. LUMMUS CO. C. A. 3d Cir. Certiorari denied.

No. 85–5869. LAYNE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 916.

No. 85–5870. BOAG *v.* RAINES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 769 F. 2d 1341.

No. 85–5871. PRITCHARD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 773 F. 2d 873.

No. 85–5876. MCQUEEN *v.* BARTON, ASSISTANT SUPERINTENDENT, OPERATIONS, FLORIDA STATE PRISON. C. A. 11th Cir. Certiorari denied. Reported below: 773 F. 2d 1237.

No. 85–5877. ZENO *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 85–5883. WELCH *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 37.

No. 85–5884. MUHAMMED, AKA GRIFFITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 776 F. 2d 1045.

No. 85–5885. TUCKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 1171.

No. 85–5887. OWENS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 497 A. 2d 1086.

No. 85–5888. MCKENZIE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 768 F. 2d 602.

No. 85–5909. WHARTON *v.* ABBEVILLE SCHOOL DISTRICT No. 60 ET AL. C. A. 4th Cir. Certiorari denied.

No. 85–5945. LUQMAN *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 85–6027. WEST *v.* WARREN COUNTY FISCAL COURT ET AL. C. A. 6th Cir. Certiorari before judgment denied.

No. 85–472. BULLOCH ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE O'CONNOR would grant certiorari. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 763 F. 2d 1115.

No. 85–581. BULLOCH ET AL. *v.* PEARSON ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE O'CONNOR would grant certiorari. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 768 F. 2d 1191.

No. 85–509. SESTRIC *v.* CLARK ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 765 F. 2d 655.

No. 85–528. GOLDFARB *v.* SUPREME COURT OF VIRGINIA ET AL. C. A. 4th Cir. Motion of American Corporate Counsel Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 766 F. 2d 859.

No. 85–735. SIRIPAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 771 F. 2d 840.

No. 85–898. GEIGER, CONSERVATOR OF THE ESTATE OF GEIGER *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 769 F. 2d 583.

No. 85–847. MASON ET AL. *v.* CONTINENTAL GROUP, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 1219.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

In this case, the United States Court of Appeals for the Eleventh Circuit ruled that beneficiaries of an Employee Retirement Income Security Act (ERISA) plan must exhaust internal plan remedies before suing plan fiduciaries on the basis of an alleged violation of duties imposed by the statute. Although this ruling is consistent with the law of the Seventh Circuit, see *Kross* v. *Western Electric Co.*, 701 F. 2d 1238 (1983), it is at odds with a decision of the Ninth Circuit, *Amaro* v. *Continental Can Co.* 724 F. 2d 747 (1984), which held that plaintiffs alleging a statutory violation (as opposed to a mere denial of benefits owing under an ERISA plan) need not exhaust internal remedies.* The Third Circuit has noted the existence of this conflict but failed to take a direct position on it, see *Barrowclough* v. *Kidder, Peabody & Co.*, 752 F. 2d 923, 939, n. 15 (1985), although that court's acceptance of the notion that statutory ERISA claims are normally not arbitrable seems to reflect agreement with the Ninth Circuit's approach. See *id.*, at 941.

I believe that the Court should grant certiorari in this case in order to resolve the uncertainty over the existence of an exhaustion requirement in cases of this kind. The increasing significance of ERISA litigation is apparent from the growing number of such cases that appear on our docket; in a field so productive of federal litigation, the need for clear procedural rules governing access to the federal courts is imperative. Moreover, because the coverage of particular ERISA plans frequently extends to beneficiaries in more than one State—and, no doubt, in more than one judicial circuit—differences in the rules governing access to federal court for the purpose of pressing a claim under ERISA may have the troubling effect of encouraging forum shopping by plaintiffs. Accordingly, the conflict among the Circuits over the issue of an exhaustion requirement under ERISA can hardly be passed

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*Cf. *Amato* v. *Bernard*, 618 F. 2d 559 (CA9 1980) (adopting exhaustion requirement where beneficiary merely seeks benefits due under the terms of an ERISA plan).

over as an unimportant one unworthy of this Court's attention. I therefore dissent from the denial of certiorari.

No. 85-5571. MESSER *v.* KEMP, WARDEN. C. A. 11th Cir. Certiorari denied. JUSTICE BLACKMUN dissents from the denial of the petition for writ of certiorari. Reported below: 760 F. 2d 1080.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner in this case, James Messer, was sentenced to death by a jury that was unable in any meaningful fashion to give him the "individualized consideration" to which he has a constitutional right, *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (plurality opinion), because of egregiously unprofessional assistance by his trial counsel. I believe that petitioner has clearly met the standard that this Court set in *Strickland* v. *Washington*, 466 U. S. 668 (1984), for establishing ineffective assistance during the sentencing phase of his trial, and I would accordingly grant the petition and vacate petitioner's sentence.

I

Petitioner was convicted of kidnaping and murdering his 8-year-old niece. After his conviction and sentence were affirmed on direct review, he sought a writ of habeas corpus in state court, alleging, *inter alia*, ineffective assistance of counsel. The court declined to hold a hearing, made no findings, and denied the writ. Petitioner then sought federal habeas relief. The Magistrate to whom the case was referred recommended that the writ be granted as to the sentence, concluding that petitioner had received ineffective assistance during the penalty phase. The District Court nevertheless denied the writ. It concluded that petitioner had not established prejudice, as required by *Strickland*, *supra*, and therefore did not reach the question whether counsel gave adequate assistance. The Court of Appeals affirmed, 760 F. 2d 1080 (CA11 1985), with one judge dissenting, *id.*, at 1093 (Johnson, J.).

II

The only factfinder that has considered the question, the Federal Magistrate, found that petitioner has met the first *Strickland* criterion—that counsel's performance at the sentencing phase was "outside the wide range of professionally competent assistance,"

Strickland, supra, at 690. Even the most cursory review of petitioner's trial demonstrates that the Magistrate's conclusion was inescapable.

At petitioner's hearing before the Magistrate, counsel testified that he had decided as a matter of strategy to adopt a "low-key" approach during the guilt phase, in hopes of establishing credibility with the jury. He had then hoped to "humanize" petitioner during the sentencing phase and try to convince the jury to spare petitioner's life. 760 F. 2d, at 1088. Both the majority and the dissenter in the Court of Appeals concluded that this strategy was not unreasonable in light of the overwhelming evidence of petitioner's guilt. *Id.*, at 1090, 1095.

Counsel succeeded admirably in implementing the first part of his strategy. He made no opening statement and put on no case in chief. He performed only cursory cross-examination, and did not object to any evidence. *Id.*, at 1089. Counsel's attempts to carry out the second prong of his strategy, however, were piteously deficient. His brief summation during the guilt phase, after acknowledging his "frustration" with the case, App. B to Pet. for Cert. 14 (opinion of District Court), went on to "emphasize the horror of the crime," 760 F. 2d, at 1095 (Johnson, J., dissenting), to the very jury that would soon be called upon to determine whether the murder was "outrageously or wantonly vile, horrible, or inhuman," Ga. Code Ann. § 17–10–30(b)(7) (1982).

During the penalty phase, counsel put on a single witness, petitioner's mother. She testified concerning petitioner's childhood, which was marred by mistreatment at the hands of his father and his parents' subsequent divorce. The effect of this implied plea for pity, however, was then destroyed when counsel, despite having previously warned the witness to avoid the topic, asked her what petitioner had told her about his expectations. She replied "he and I both, my sister, and my mother expect the death penalty here." 760 F. 2d, at 1096.

It was counsel's summation during the penalty phase, however, that led the Magistrate to conclude that petitioner's Sixth Amendment right to counsel had been violated. His statement, which the Magistrate called a "nonargument," *id.*, at 1097, made no mention of petitioner's mother's testimony nor of any other mitigating

evidence.* Counsel did not inform the jury, during summation or at any other time, that petitioner had no prior criminal history, had been steadily employed, had an honorable military record, had been a regular churchgoer, and had cooperated with the police. See *id.*, at 1096, n. 2. Counsel did not give the jury a single reason why it should spare petitioner's life. As the Magistrate noted, counsel "utterly failed to point out any matters which were favorable to [petitioner]—to 'humanize' him, even though this was his alleged 'tactic.'" App. C to Pet. for Cert. 51 (Magistrate's Report and Recommendation). Instead, counsel repeatedly hinted that death was the most appropriate sentence for petitioner. He "focused on the awesome burden placed on the jury in determining Messer's fate and the fortitude that would be required of a juror to decide to let him live, as if the easiest and most obvious verdict were the death sentence." 760 F. 2d, at 1097.

The net result was that petitioner was without an advocate at the sentencing phase. "No one addressed the jury and said that Messer did not deserve to die." *Ibid.* Like the Magistrate and the dissenter in the Court of Appeals, I cannot help but conclude that a total breakdown in the adversarial process occurred in this case.

III

The District Court rejected the Magistrate's conclusion because it felt that petitioner had not established the second *Strickland* criterion—that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, *supra*, at 694. The Court of Appeals held that counsel's performance was not constitutionally deficient. Yet it never even mentioned counsel's summation nor the Magistrate's finding that the summation was unreasonable and ineffective. I can only presume that the Court of Appeals failed to find prejudice as to the summation, based on its conclusory statement that "petitioner has failed to show that [counsel's] performance during the sentencing phase was deficient to the extent that this court cannot rely on the result as being just." 760 F. 2d, at 1092 (citation omitted).

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*Counsel's summation at the penalty phase, in its entirety, is set out in an Appendix to this opinion.

The result below is thus an example of the gross unfairness that results when the *Strickland* prejudice standard is applied without regard to the special characteristics of a capital sentencing proceeding. See *Strickland*, 466 U. S., at 715–717 (MARSHALL, J., dissenting). Those proceedings have a much different function than the relatively mechanical inquiry of the guilt phase, and the likelihood that an appellate court can accurately divine a jury's probable response to evidence or arguments is accordingly less. Just last Term this Court reiterated that a capital defendant has a constitutional right to the consideration of "[w]hatever intangibles a jury might consider in its sentencing determination." *Caldwell* v. *Mississippi*, 472 U. S. 320, 330 (1985); see also *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (defendant has constitutional right to consideration of mitigating factors). Yet as applied by the courts below, *Strickland* permits unprofessional conduct by trial counsel to deprive a capital defendant of that right.

Viewed in the correct light—that is, considering what the jury in this case might have done if presented with a true adversarial debate on the appropriateness of sentencing petitioner to death—one cannot possibly conclude that there is no "reasonable probability" that the outcome would have been different. This is not a case in which, despite unreasonable errors by counsel, the jury was presented with a substantially accurate picture of the defendant and with some cogent argument in favor of life. The jury here was never apprised of several substantial mitigating factors. More important, counsel presented the jury with no reasons to spare petitioner's life and, indeed, strongly intimated that he could think of none.

Despite these strong indicia of unreliability, the District Court found the absence of prejudice as to the *sentencing* phase based primarily on its conclusion that the evidence of petitioner's *guilt* was overwhelming, App. B to Pet. for Cert. 3, and the Court of Appeals blithely assumed the jury's role, finding the result "just," 760 F. 2d, at 1092. If the *Strickland* prejudice standard has any vitality at all, it requires a more searching inquiry than that. I dissent.

APPENDIX TO OPINION OF MARSHALL, J., DISSENTING

"Your Honor, ladies and gentlemen, since ya'll were selected I might add I haven't taken the opportunity to talk to ya'll a lot

but I have been honest and in that honesty I haven't tried in any form or fashion to do anything other than see that the facts in this case were presented and they were very ably presented, there's no question about that.

"Now, I knew that when I got involved in this case at the beginning they would be. The question in this case is not the facts. Twenty-nine times I said 'no questions.' Thirty times I said 'no objections' to a witness being excused. Each and every one of us knows the young girl died. Like Mr. Foster, I have two young children of my own and believe you me that makes it more difficult for me to stand here in front of you all right now, each and every one of you, than it does for Mr. Foster, I dare say. I don't ask you to appreciate that. I don't ask for that at all. I just want to be straight up and honest about this whole thing and where we're all coming from. Each and every one of you in this jury box know before this case started, or had some slight idea, that we were going to be at this point today where we are now and the decision was going to come down to the twelve of you and what you determine to be Mr. Messer's fate.

"I dare say, and it has been suggested to me, and I say this in all humble candor, by some both here and in Rome that I ought to argue to this jury to leave him alive is a more cruel punishment because he's got to live with it, so I don't know what to say to you. I really don't. I know that at this particular point there is no question in my mind that the verdict this jury spoke in this court room today was the truth. I don't contest that at all. The question is when the judge tells you what the law is in this situation and what is considered to make something aggravating circumstances, what is considered to mitigate circumstances, he's also going to tell you that in a situation like this you can almost disregard those and leave it up to yourselves, your gut feeling as to what it is you feel speaks the voice of the community.

"Now, the community, a great part of the community, has been here in this court room as potential jurors and as members of the audience, and it concerns Polk County. Interestingly enough Judge Winn told me two weeks ago that he didn't think there would be anyone here by the end of the trial that it had been a long time since there had been a trial like this and the last time a good many years ago he could remember that there just wasn't ten or fifteen people by the time the trial got done with, people were just that uninterested. But that's not true in this situation

because people have been very interested, and very interested right now with what is this community's voice through ya'll going to be.

"Unfortunately I do not agree again with Mr. Foster as to his position that each and every one of you by rendering a verdict that speaks for the death penalty are being brave. In not doing that you're showing people outside of Polk County that you don't know how to deal with people who take the lives of others in Polk County. That's not the issue. Nor is it the bravest thing to do in this situation to vote the death penalty. It would take a heck of a lot more guts to say that there's something in that human being who sits over there, sits over there having to remember what ya'll have just learned about him. There's something that put him on this earth and it's worth leaving on this earth. Ya'll have the power to extinguish him from this earth, a legal right to do that if you so desire. The District Attorney does not have that right. You are but his implement to do that, each one of you, all twelve of you, to the extent that you choose to use that the law allows each and every one of you to do it. That's an awesome responsibility and I dare say I would rather be over here than in ya'll's seats, because as a parent under these circumstances . . . but that's for ya'll to decide. Please however, as the judge will charge you, the decision is each and every one of yours individually and then as a group, your decision be it give him life or death is your decision, you need not worry about what happens after that decision as to how it's carried out. That makes it a lot easier as far as the decision is concerned in having to live with it but it's still your decision, and if your decision is life that is a decision that you have come about to make freely and honestly based upon all that you've heard in the case and there might be some reason to leave this man on the face of the earth then hold onto that decision, if not then let it go, but make it your own decision each and every one of you, don't make it a decision of your friends and neighbors that you just adopt. I dare say ten years ago had any of you ever pictured yourselves being in this situation and having to make this decision ten years from then you wouldn't.

"Thank you." Tr. 516–519.

No. 85–5678. MCKENNA *v.* NEVADA. Sup. Ct. Nev.;
No. 85–5727. JOHNSON *v.* MARYLAND. Ct. App. Md.;
No. 85–5831. STANO *v.* FLORIDA. Sup. Ct. Fla.;

No. 85–5882. GRIFFIN *v.* FLORIDA. Sup. Ct. Fla.;

No. 85–5926. BUTLER *v.* SOUTH CAROLINA. Sup. Ct. S. C.; and

No. 85–5930. FRANCIS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 85–5678, 101 Nev. 338, 705 P. 2d 614; No. 85–5727, 303 Md. 487, 495 A. 2d 1; No. 85–5831, 473 So. 2d 1282; No. 85–5882, 474 So. 2d 777; No. 85–5926, 286 S. C. 441, 334 S. E. 2d 813; No. 85–5930, 473 So. 2d 672.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85–5747. WRIGHT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 473 So. 2d 1277.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

I would grant certiorari in this capital case to ensure that the Florida courts have not sentenced a man to die based on a conviction obtained in violation of the Sixth Amendment.

On February 6, 1983, a woman was found murdered in the bedroom of her home. She apparently had died the previous night after being raped and stabbed. All the doors to her home were locked, but a back window was found open. Several weeks later, Charles Westberry told his wife that petitioner Joel Wright had come to Westberry's trailer shortly after daylight on the morning of February 6 and had confessed to killing the victim. Wright lived with his parents near the victim's home. Westberry's wife notified the police, and Wright was arrested and tried for the crime. At trial, Westberry was the State's principal witness. He testified that Wright had told him on the morning of February 6 that Wright had entered the victim's house through the back window to steal money, that the victim had discovered him as he was wiping his fingerprints from her purse, and that he had killed her because he did not want to return to prison. According to Westberry, Wright counted out $290 he claimed to have taken from the victim's home, and he asked Westberry to tell the authorities that Wright had spent the previous night at Westberry's

trailer. Another witness for the State testified that, approximately one month before the murder, he and Wright had stolen money from the victim's home after entering through the window later found open on February 6. The jury also was told that a fingerprint identified as Wright's had been found on a portable stove in the victim's bedroom.

Wright took the stand and denied involvement in the murder. He testified that he had returned home from a party at approximately 1 a. m. on February 6, but had found himself locked out. He claimed that he then had walked along Highway 19 to Westberry's trailer, where he had spent the night. He also presented a witness who testified that, late on the night of February 5 and early in the morning of February 6, he had seen a group of three men, whom he had not recognized, in the general vicinity of the victim's home.

After the close of evidence but prior to final arguments, the defense moved to reopen the case in order to introduce the testimony of a newly discovered witness, Kathy Waters. Waters apparently had read newspaper accounts of the trial, had listened to parts of the testimony, and had discussed the trial with friends in attendance. She offered to testify that, shortly after midnight on February 6, she had seen a person who could have been Wright walking along Highway 19, and had also observed three persons she did not recognize near the victim's home. Waters claimed that she had not realized she possessed relevant information until the morning her testimony was proffered, and that she had come forward of her own volition. The trial judge denied Wright's motion, noting that Florida's sequestration rule would be rendered "meaningless" if, after discussing the case with others, a witness were permitted "to testify in support of one side or the other, almost as if that testimony were tailor-made." 473 So. 2d 1277, 1279 (1985). Although the State acknowledged that the violation of the sequestration rule had been inadvertent, it argued that the prosecution "could very well be substantially prejudiced" if Waters were permitted to testify. *Id.*, at 1280. Wright was convicted and sentenced to die.

On appeal, the Supreme Court of Florida held that the trial judge's rigid application of the State's sequestration rule was inconsistent with Wright's Sixth Amendment right to present witnesses in his behalf. The court affirmed the conviction, however, because it deemed the error harmless:

"The record already contained unrefuted testimony that three individuals were gathered near the victim's home. The defense did not contend that the proffered witness would purport to identify [Wright] as the person she observed on the road or that her testimony, if accepted by the jury, would require a finding by the jury that [Wright] did not commit the murder. Based upon our review of the record, including the nature of the proffered testimony, we conclude that the excluded evidence would not have affected the verdict and its exclusion was harmless beyond a reasonable doubt." 473 So. 2d, at 1280–1281.

The State Supreme Court thus recognized that a conviction resulting from a trial marred by constitutional error must be reversed unless the error was "harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U. S. 18, 24 (1967); see also, *e. g.*, *United States* v. *Hasting*, 461 U. S. 499 (1983). It seems to me, however, that the court failed to show the requisite attentiveness to the possibility of prejudice. A constitutional violation may be excused under *Chapman* only if the State "prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U. S., at 24. It is not sufficient for a reviewing court to conclude, as the Supreme Court of Florida appears to have done in this case, that in its judgment the error did not change the verdict. The question is whether the State has disproved any "reasonable possibility" that the error made a difference. *Ibid.*; *Fahy* v. *Connecticut*, 375 U. S. 85, 86 (1963).

The State of Florida may well be able to carry that burden in this case, but nothing in the Supreme Court's opinion or in the State's brief before this Court convinces me that it has done so. Since Wright's fingerprint could have been left during the alleged earlier break-in, this case comes down to Wright's word against Westberry's. Waters' testimony obviously would not have proved Wright innocent, but it would have provided some corroboration for Wright's story. Questions of witness credibility, of course, are within the "special province" of the factfinder, *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 856 (1982), and I cannot say "beyond a reasonable doubt" that the corroboration Waters offered could not have altered the jury's assessment of the conflicting stories. More to the point, I do not

see how the Supreme Court of Florida could make that statement, particularly given the prosecution's claim of potentially substantial prejudice and the trial judge's suggestion that Waters' testimony appeared almost "tailor-made" for the defense.

The *Chapman* rule was meant to be more than merely a formula to incant before affirming the results of constitutionally infirm prosecutions. For the rule to have content, a reviewing court must not declare a constitutional error harmless without first conducting a careful and probing inquiry into the possibility of prejudice. Nothing less will suffice if the court is to be convinced "beyond a reasonable doubt" that the error had no effect on the verdict. Furthermore, at least in any case where the harmlessness of an error is as questionable as it is here, an appellate court should spell out its reasoning in sufficient detail to permit this Court to verify compliance with *Chapman*. Our concern of course must be not merely that *Chapman* is cited, but that it is followed conscientiously. For me, that concern is not satisfied by the opinion of the Florida Supreme Court in this case, particularly given the sentence imposed. Consequently, I would grant certiorari, vacate the judgment, and remand for a determination whether there is any "reasonable possibility" that the automatic exclusion of Waters' testimony contributed to Wright's conviction.

Rehearing Denied

No. 85–48. SUAREZ *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, *ante*, p. 844;

No. 85–247. CRANBERG *v.* CONSUMERS UNION OF UNITED STATES, INC., ET AL., *ante*, p. 850;

No. 85–295. COUNTY OF LOS ANGELES ET AL. *v.* KLING, *ante*, p. 936;

No. 85–583. FAHEY *v.* BECKLEY ET AL., *ante*, p. 1001;

No. 85–650. MCCORSTIN *v.* UNITED STATES STEEL CORP., *ante*, p. 1008;

No. 85–5121. FREELAND *v.* UNITED STATES, *ante*, p. 1009;

No. 85–5547. SPELLMAN *v.* INTEGON GENERAL INSURANCE CORP., *ante*, p. 1010; and

No. 85–5647. WILSON *v.* UNITED STATES, *ante*, p. 1012. Petitions for rehearing denied.

No. 84–6943. MAZAK *v.* UNITED STATES, *ante*, p. 840; and

No. 85–5177. GORDON *v.* IDAHO, *ante*, p. 803. Motions for leave to file petitions for rehearing denied.

JANUARY 27, 1986

Appeals Dismissed

No. 85-616. SHARON STEEL CORP. *v.* CITY OF FAIRMONT, WEST VIRGINIA, ET AL. Appeal from Sup. Ct. App. W. Va. dismissed for want of substantial federal question. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: —— W. Va. ——, 334 S. E. 2d 616.

No. 85-871. WILLARDO *v.* INDIANA. Appeal from Ct. App. Ind. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 476 N. E. 2d 540.

No. 85-967. SMITH ET UX. *v.* UNITED STATES ET AL. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-5786. DAVIS *v.* FIRST STATE BANK. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 85-193. U. S. TRUST CORP. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Board of Governors of Federal Reserve System* v. *Dimension Financial Corp.*, *ante*, p. 361. Reported below: 760 F. 2d 1135.

No. 85-833. CHULA VISTA CITY SCHOOL DISTRICT ET AL. *v.* BENNETT, SECRETARY OF EDUCATION. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals to transfer the case pursuant to 28 U. S. C. § 1631 to the United States Court of Appeals for the Federal Circuit. See 28 U. S. C. § 1295(a)(2). Reported below: 762 F. 2d 762.

Miscellaneous Orders

No. ———. PESCOSOLIDO ET AL. *v.* SECRETARY OF AGRICULTURE. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–551. DOLE, SECRETARY OF TRANSPORTATION, ET AL. *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL. Application of the Solicitor General to vacate a stay entered January 3, 1986, by the United States Court of Appeals for the Ninth Circuit, presented to JUSTICE REHNQUIST, and by him referred to the Court, granted.

No. D–527. IN RE DISBARMENT OF MANN. Disbarment entered. [For earlier order herein, see *ante*, p. 917.]

No. D–531. IN RE DISBARMENT OF CAMACHO. Disbarment entered. [For earlier order herein, see *ante*, p. 991.]

No. 84–2030. BROWN-FORMAN DISTILLERS CORP. *v.* NEW YORK STATE LIQUOR AUTHORITY. Ct. App. N. Y. [Probable jurisdiction noted, *ante*, p. 814.] Motion of National Conference of State Legislatures et al. for leave to file a brief as *amici curiae* granted. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

No. 85–93. BAZEMORE ET AL. *v.* FRIDAY ET AL.; and
No. 85–428. UNITED STATES ET AL. *v.* FRIDAY ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 978.] Motion of the Solicitor General for divided argument granted, and the Solicitor General is allotted 12 minutes for oral argument and petitioners Bazemore et al. are allotted 18 minutes for oral argument.

No. 85–217. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO *v.* DAVIS. Sup. Ct. Ala. [Probable jurisdiction noted, *ante*, p. 899.] Motion of National Right to Work Legal Defense Foundation, Inc., for leave to file a brief as *amicus curiae* granted.

No. 85–385. BROCK, SECRETARY OF LABOR *v.* PIERCE COUNTY. C. A. 9th Cir. [Certiorari granted, *ante*, p. 944.] Motion of National Association of Counties et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 85–390. CITY OF LOS ANGELES ET AL. *v.* PREFERRED COMMUNICATIONS, INC. C. A. 9th Cir. [Certiorari granted, *ante*, p. 979.] Motion of National Institute of Municipal Law Officers for leave to file a brief as *amicus curiae* granted.

No. 85–546. UNITED STATES *v.* MOTTAZ. C. A. 8th Cir. [Certiorari granted, *ante*, p. 994.] Motion of American Land Title Association for leave to file a brief as *amicus curiae* granted.

No. 85–5404. ALLEN *v.* ILLINOIS. Sup. Ct. Ill. [Certiorari granted, *ante*, p. 979.] Motion of Edwin F. Mandel Legal Aid Clinic for leave to file a brief as *amicus curiae* granted.

No. 85–5749. IN RE ST. CLAIRE;
No. 85–5835. IN RE PATRASCU; and
No. 85–5973. IN RE THANH. Petitions for writs of mandamus denied.

No. 85–5875. IN RE MAY; and
No. 85–5878. IN RE MAY. Petitions for writs of mandamus and/or prohibition denied.

No. 85–5866. IN RE GRIFFIN. Petition for writ of prohibition denied.

Certiorari Granted

No. 84–1947. CERBONE, JUSTICE OF THE VILLAGE COURT, VILLAGE OF MT. KISCO, NEW YORK, ET AL. *v.* CONWAY. C. A. 2d Cir. Certiorari granted limited to Questions 1, 2, 3, and 4 presented by the petition. Reported below: 750 F. 2d 205 and 758 F. 2d 46.

Certiorari Denied. (See also Nos. 85–871, 85–967, and 85–5786, *supra*.)

No. 84–1867. GILLIES *v.* DELOZIER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 647.

No. 84–6216. AUSLEY ET AL. *v.* MITCHELL, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 748 F. 2d 224.

No. 85–155. COUGHLIN ET AL. *v.* PATTERSON. C. A. 2d Cir. Certiorari denied. Reported below: 761 F. 2d 886.

No. 85–210. TOWN OF SAUGUS ET AL. *v.* VOUTOUR. C. A. 1st Cir. Certiorari denied. Reported below: 761 F. 2d 812.

No. 85–535. QUINAULT INDIAN NATION ET AL. *v.* WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 761 F. 2d 1404.

No. 85–547. HARRELL *v.* UNITED STATES;
No. 85–5476. GIBSON *v.* UNITED STATES;
No. 85–5485. GRAVES *v.* UNITED STATES;
No. 85–5488. MARCACCIO *v.* UNITED STATES;

No. 85–5493. WHITE *v.* UNITED STATES;
No. 85–5500. KEATING *v.* UNITED STATES;
No. 85–5506. SEAVER *v.* UNITED STATES;
No. 85–5516. LACKEY *v.* UNITED STATES;
No. 85–5517. HART *v.* UNITED STATES; and
No. 85–5523. RUBY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 1459 and 766 F. 2d 1493.

No. 85–634. KIRCHNER *v.* KIRCHNER. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 474 So. 2d 226.

No. 85–638. CLEMENTE *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 766 F. 2d 1358.

No. 85–700. ALLEN *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 1145.

No. 85–715. MOORE *v.* LAVICKY. C. A. 10th Cir. Certiorari denied. Reported below: 758 F. 2d 468.

No. 85–729. BRONGER ET AL. *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 769 F. 2d 756.

No. 85–742. JEPPESEN & CO. *v.* BROCKLESBY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 1288.

No. 85–747. TIMBERLAKE *v.* UNITED STATES; and
No. 85–5473. ENGELHART *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 767 F. 2d 1479.

No. 85–756. ADAMS *v.* MCILHANY. C. A. 5th Cir. Certiorari denied. Reported below: 764 F. 2d 294.

No. 85–805. VIZBARAS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF VIZBARAS, ET UX. *v.* PRIEBER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 761 F. 2d 1013.

No. 85–825. DAY *v.* SOUTH PARK INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 768 F. 2d 696.

No. 85–858. DE NARDO *v.* COOK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 911.

No. 85–868. HURWITZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 700 S. W. 2d 919.

No. 85–877. SWAN *v.* TEXAS. Ct. App. Tex., 11th Sup. Jud. Dist. Certiorari denied.

No. 85–883. PARK, DBA ACTION REAL ESTATE *v.* EL PASO BOARD OF REALTORS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 764 F. 2d 1053.

No. 85–895. RATEPAYERS FIGHT BACK *v.* MIDDLE SOUTH ENERGY, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 772 F. 2d 404.

No. 85–896. JOHNSON *v.* LINDEN SHORE DISTRICT. Sup. Ct. Conn. Certiorari denied. Reported below: 197 Conn. 803, 495 A. 2d 282.

No. 85–918. MOTHER GOOSE NURSERY SCHOOLS, INC. *v.* SENDAK, INDIVIDUALLY AND AS FORMER ATTORNEY GENERAL OF INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 770 F. 2d 668.

No. 85–925. CHRISTENSEN *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 340.

No. 85–928. INSURANCE COMPANY OF NORTH AMERICA ET AL. *v.* PUERTO RICO MARINE MANAGEMENT, INC. C. A. 1st Cir. Certiorari denied. Reported below: 768 F. 2d 470.

No. 85–934. SHOCKLEY *v.* COX ENTERPRISES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 174.

No. 85–936. MORAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 759 F. 2d 777.

No. 85–941. JONES ET AL., INDIVIDUALLY AND AS CO-ADMINISTRATORS FOR THE ESTATE OF CLARK *v.* WELLS, SHERIFF OF MARION COUNTY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1049.

No. 85–945. OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION *v.* SOUTH DAKOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 770 F. 2d 730.

No. 85–948. KOSCOT INTERPLANETARY, INC. *v.* BEACHLEY INVESTMENTS, N. V., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1178.

No. 85–952. GRASON ELECTRIC CO. ET AL. *v.* SACRAMENTO MUNICIPAL UTILITY DISTRICT. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 833.

No. 85–5242. MUHAMMAD *v.* SEMICOLE ALLIED VAN LINES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 259.

No. 85–5552. HAWKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 1482.

No. 85–5626. HAMM *v.* PARKER, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 85–5634. BERNARD *v.* BERNARD ET AL. C. A. 9th Cir. Certiorari denied.

No. 85–5635. HAUPTMANN *v.* WILENTZ ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1070.

No. 85–5649. WAGGONER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 769 F. 2d 253.

No. 85–5681. OGBERAHA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 771 F. 2d 655.

No. 85–5683. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 2d 413.

No. 85–5733. STEWART, AKA WHITE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 825.

No. 85–5750. RHODES *v.* UNITED STATES DEPARTMENT OF THE INTERIOR. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 182.

No. 85–5890. BAIG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1455.

No. 85–5891. ANTONELLI *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 108 Ill. 2d 573.

No. 85–5892. MOYER *v.* DISTRICT DIRECTOR OF THE INTERNAL REVENUE SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1073.

No. 85–5893. NICKENS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 477 So. 2d 946.

No. 85–5894. TRIPLETT *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 210.

No. 85–5895. MICKENS *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 760 F. 2d 539.

No. 85–5896. RUBIN *v.* BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES (WESTERN ILLINOIS UNIVERSITY). C. A. 7th Cir. Certiorari denied.

No. 85–5897. REID *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1063.

No. 85–5898. ZURICA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 35.

No. 85–5899. TRICHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1175.

No. 85–5903. BERNARD *v.* WARDEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 148.

No. 85–5904. DARWIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 775 F. 2d 302.

No. 85–5905. LEEK *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85–5910. PIERCE *v.* UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND FOR 1950 AND 1974 ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 449.

No. 85–5916. SMITH *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 101 Nev. 965.

No. 85–5941. HANRAHAN *v.* WELBORN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1167.

No. 85–5942. COTTON *v.* FEDERAL LAND BANK OF COLUMBIA. Sup. Ct. Ga. Certiorari denied.

No. 85–5956. LARGO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 775 F. 2d 1099.

No. 85–5959. WHAM *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 2d 162.

No. 85–5963. CALVER *v.* OWNERS OF RIDGECREST MOBILE HOME PARK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 775 F. 2d 299.

No. 85–6006. LEPISCOPO *v.* YORK. C. A. 10th Cir. Certiorari denied.

No. 85–6049. GALLENTINE *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 85–429. EXXON CORP. *v.* UNITED STATES ET AL.;
No. 85–430. MARATHON PETROLEUM CO. ET AL. *v.* UNITED STATES ET AL.;
No. 85–432. AIR TRANSPORT ASSOCIATION OF AMERICA ET AL. *v.* UNITED STATES ET AL.;
No. 85–440. PHILADELPHIA ELECTRIC CO. *v.* UNITED STATES ET AL.; and
No. 85–444. NATIONAL FREIGHT, INC., ET AL. *v.* UNITED STATES ET AL. Temp. Emerg. Ct. App. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* in No. 85–429 granted. Motion of American Petroleum Institute for leave to file a brief as *amicus curiae* in Nos. 85–429 and 85–430 granted. Certiorari denied. Reported below: 773 F. 2d 1240.

No. 85–720. CLEAR PINE MOULDINGS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 765 F. 2d 148.

No. 85–794. PREUIT & MAULDIN ET AL. *v.* JONES. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 1250.

JUSTICE WHITE, dissenting.

In *Wilson* v. *Garcia*, 471 U. S. 261 (1985), we held that an action under 42 U. S. C. § 1983 should be considered a personal injury action for purposes of borrowing an appropriate state statute of limitations. The present case presents the question of what to

do when more than one state statute of limitations applies to personal injury actions.

Respondent in this case is an Alabama farmer who brought a § 1983 action against petitioners for allegedly violating his Fourteenth Amendment due process rights by causing his equipment to be seized pursuant to prejudgment attachment writs that petitioners obtained without notice or a hearing. The only significant issue on appeal was the appropriate statute of limitations to borrow from the Alabama Code. 763 F. 2d 1250 (CA11 1985). The Eleventh Circuit explained that its task of applying *Wilson* v. *Garcia*, *supra*, was complicated by the fact that Alabama has not one but two personal injury statutes of limitations. Alabama Code § 6–2–34(1) (1975) governs actions for "any trespass to person or liberty, such as false imprisonment or assault and battery," and has been interpreted by the Alabama courts as applying to actions for trespass. Alabama Code § 6–2–39(a)(5) (1975) governs "[a]ctions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section," and has been interpreted by the Alabama courts as applying to actions for trespass on the case. The Eleventh Circuit resolved its seeming dilemma in applying *Wilson* v. *Garcia* by reasoning that while not all § 1983 actions involve trespass, trespass is "the particular type of wrong that was most paradigmatic, the one category of wrongs that the legislators [who enacted § 1983] intended first and foremost to address." 763 F. 2d, at 1255. Accordingly, the court held that the 6-year statute of limitations provided by § 6–2–34(1), rather than the then 1-year statute of limitations provided by § 6–2–39(a)(5), should govern § 1983 actions in Alabama.[1]

The Eleventh Circuit's decision in this case conflicts with three en banc decisions by the United States Court of Appeals for the Tenth Circuit, all of which were companion cases to the decision we affirmed in *Wilson* v. *Garcia*, *supra*. In *Hamilton* v. *City of Overland Park, Kansas*, 730 F. 2d 613, 614 (1984) (en banc), cert. denied, 471 U. S. 1052 (1985), the Tenth Circuit rejected, for § 1983 purposes, use of the 1-year Kansas statute of limitations governing "'[a]n action for assault, battery, malicious prosecution, or false imprisonment,'" and instead chose the 2-year limitations

[1] Section 6–2–39(a)(5) has been recodified as § 6–2–38(l) (Supp. 1985) and now provides a 2-year statute of limitations, pursuant to an amendment effective January 9, 1985.

period for "'[a]n action for injury to the rights of another, not arising on contract, and not herein enumerated.'" In *Mismash* v. *Murray City*, 730 F. 2d 1366, 1367 (1984) (en banc), cert. denied, 471 U. S. 1052 (1985), the Tenth Circuit similarly rejected use of the 1-year Utah statute of limitations governing "'[a]n action for libel, slander, assault, battery, false imprisonment or seduction,'" and, in the absence of an express Utah statute of limitations governing actions for injury to the rights of another, opted for the 4-year limitations period for "'[a]n action for relief not otherwise provided by law.'" Finally, in *McKay* v. *Hammock*, 730 F. 2d 1367, 1370 (1984) (en banc), a case in which certiorari was not sought, the Tenth Circuit noted that Colorado had distinct statutes of limitations for actions for trespass (one year) and trespass on the case (six years), and, finding the distinction between trespass and trespass on the case irrelevant to § 1983, opted instead to use the residuary 3-year period for "'[a]ll other actions of every kind for which no other period of limitation is provided by law.'"

As the foregoing cases demonstrate, the Tenth Circuit finds it inappropriate to borrow for § 1983 purposes a statute of limitations governing common-law trespasses, preferring instead to look for a statute more compatible with its characterization of a § 1983 action as "in essence an action for injury to personal rights." *Garcia* v. *Wilson*, 731 F. 2d 640, 651 (1984), aff'd, 471 U. S. 261 (1985). The conflict between the Tenth and Eleventh Circuits is evidenced with particular clarity in *Hamilton*, *supra*, where the statutes of limitations chosen and rejected are virtual mirror images of the statutes of limitations chosen and rejected in this case.

The conflict regarding the appropriate criteria for choosing a statute of limitations for § 1983 actions is not limited to the Tenth and Eleventh Circuits. In *Gates* v. *Spinks*, 771 F. 2d 916 (1985), the Fifth Circuit, expressly following the Eleventh Circuit's decision in this case, rejected a 6-year Mississippi residuary statute of limitations which governs negligence and strict-liability personal injury actions in that State, and instead decided that § 1983 cases should be governed by the 1-year limitations period governing "most, if not all, common law intentional torts." *Id.*, at 919. *Gates* v. *Spinks* is worth noting, not only because it is clearly inconsistent with the Tenth Circuit's decision in *Mismash* v. *Murray City*, *supra*, but also because it highlights an effect of following the Eleventh Circuit's decision in this case which is not obvious from the present decision: The § 1983 statute of limitations will

as a rule be shorter if based on a statute of limitations governing intentional torts than it would if based on a more general statute of limitations governing other personal injury actions.[2]

It will not do to argue, as respondent does in his Brief in Opposition 5–8, that no conflict is possible because each state statutory scheme is *sui generis*. It is conflicting principles, not variations in state statutory schemes, that have determined the statutes of limitations chosen for § 1983 actions in the Tenth Circuit on the one hand and the Fifth and Eleventh Circuits on the other.

The conflict between the Circuits presented by this case is not likely to disappear without guidance from this Court.[3] While the Tenth Circuit's characterization of a § 1983 action as one for injury to personal rights is arguably somewhat different from the personal injury characterization we adopted in *Wilson* v. *Garcia*, 471 U. S. 261 (1985), it seems doubtful that the Tenth Circuit will soon overrule its en banc decisions in *Hamilton*, *supra*, and *Mismash*, *supra*, in view of the fact that we denied certiorari in those cases after *Wilson* v. *Garcia* was decided. Had we considered those decisions inconsistent with *Wilson*, our normal course would have been to grant certiorari in order to vacate the decisions below and remand for reconsideration in light of *Wilson*. Since we did not see fit to call for the Tenth Circuit to reconsider those decisions, it is predictable that it will adhere to them, notwithstanding the conflicting decisions by the Eleventh and Fifth Circuits.

It is clear to me that the Court should provide further guidance to the lower courts on the issue here presented, and I see no benefit in delaying its resolution. While I understand the Court's re-

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[2] The following is a sampling, which does not purport to be exhaustive, of statutes of limitations akin to those at issue in the present case. For each State, the first, longer statute of limitations governs actions described in language virtually identical to Ala. Code § 6–2–39(a)(5) (1975), and the second, shorter statute of limitations governs all of the following intentional torts: libel, slander, assault, battery, and false imprisonment. Minn. Stat. §§ 541.05 (6 years), 541.07 (2 years) (Supp. 1985); Mo. Rev. Stat. §§ 516.120 (5 years), 516.140 (2 years) (1978); N. C. Gen. Stat. §§ 1–52(5) (3 years), 1–54(3) (1 year) (1983); Okla. Stat., Tit. 12, §§ 95 (Third) (2 years), 95 (Fourth) (1 year) (1981); S. C. Code § 15–3–530(5) (6 years) (Supp. 1985), § 15–3–550(1) (2 years) (1976).

[3] Uniformity could also be achieved, of course, by congressional enactment of a uniform period of limitations for § 1983 actions. That course has much to commend it, but it is unacceptable, in my view, to delay resolving a conflict among the Circuits in the hopes that Congress will intervene.

luctance to return so quickly to the issue that we had hoped to lay to rest in *Wilson* v. *Garcia*, *supra*, I must respectfully dissent.

No. 85–878. PAN AMERICAN WORLD AIRWAYS, INC., ET AL. *v.* COOK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 771 F. 2d 635.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

This petition presents the issue whether an integrated employee seniority list that was adopted by an airline pursuant to a merger plan that the Civil Aeronautics Board (CAB) approved as "fair and equitable" can be attacked collaterally by the airline's employees in an action under the Age Discrimination in Employment Act (ADEA), 29 U. S. C. § 621 *et seq.* The United States Court of Appeals for the Second Circuit held that respondents are entitled to bring such a collateral ADEA action. 771 F. 2d 635 (1985). This decision squarely conflicts with *Carey* v. *O'Donnell*, 165 U. S. App. D. C. 46, 506 F. 2d 107 (1974), cert. denied, 419 U. S. 1110 (1975). *Carey* holds that § 1006 of the Federal Aviation Act, 49 U. S. C. App. § 1486, which vests exclusive jurisdiction in the United States Court of Appeals for the District of Columbia Circuit to review CAB orders, precludes a collateral ADEA action of the type allowed by the Second Circuit in the present case. I would grant certiorari to resolve this conflict.

No. 85–888. ADKINS ET AL. *v.* TIMES-WORLD CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 771 F. 2d 829.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

The United States Court of Appeals for the Fourth Circuit held in this case that it had jurisdiction under 28 U. S. C. § 1292(a)(1) to hear respondents' appeal of a District Court order staying arbitration proceedings to which respondents were parties. 771 F. 2d 829 (1985). This holding conflicts with the decisions in *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F. 2d 80 (CA2 1961), cert. denied, 368 U. S. 986 (1962), and *Diematic Mfg. Corp.* v. *Packaging Industries, Inc.*, 516 F. 2d 975 (CA2), cert. denied, 423 U. S. 913 (1975). I would grant certiorari to resolve this conflict.

No. 85–5360. DARWIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 757 F. 2d 1193.

No. 85–5365. KHALIQ *v.* BROWN ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari.

No. 85–5533 (A–521). WILLIAMS *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death scheduled for February 18, 1986, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 85–5687. CANNON *v.* TEXAS. Ct. Crim. App. Tex.;
No. 85–5825. NETHERY *v.* TEXAS. Ct. Crim. App. Tex.; and
No. 85–5946. PEREZ *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: No. 85–5687, 691 S. W. 2d 664; No. 85–5825, 692 S. W. 2d 686; No. 85–5946, 108 Ill. 2d 70, 483 N. E. 2d 250.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85–5776. BRACY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 145 Ariz. 520, 703 P. 2d 464.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153,

227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Petitioner William Bracy was convicted of two murders and sentenced to death. He claims that the state trial court improperly barred him from pursuing, in his cross-examination of a prosecution witness, the only line of questioning that could have revealed that witness' motivation to shade his testimony in favor of the prosecution. He argues that he was thus denied his Sixth Amendment right to confront the State's witnesses against him. *Davis* v. *Alaska*, 415 U. S. 308 (1974). I believe that petitioner's claim may be substantial, requiring that his conviction be vacated.

In the pending case of *Delaware* v. *Van Arsdall* (No. 84-1279), cert. granted, 473 U. S. 923 (1985), this Court is to decide whether an absolute denial of cross-examination of a prosecution witness concerning potential bias can ever be harmless error. The Court denies certiorari in this case without even waiting to consider what light the *Van Arsdall* case will shed on the issues here. Because I consider such haste inappropriate, especially when a man's life is hanging in the balance, I dissent from the denial of certiorari.

Rehearing Denied

No. 84-5630. THOMAS *v.* ARN, SUPERINTENDENT, OHIO REFORMATORY FOR WOMEN, *ante*, p. 140;

No. 84-6270. GREEN ET AL. *v.* MANSOUR, DIRECTOR, MICHIGAN DEPARTMENT OF SOCIAL SERVICES, *ante*, p. 64;

No. 84-6910. ETHERIDGE *v.* MITCHELL, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY, *ante*, p. 1019;

No. 85-394. IN RE TRACEY, *ante*, p. 899;

No. 85-503. SPARROW *v.* HAJIMAHOLIS ET AL., *ante*, p. 1006;

No. 85-527. FAITH CENTER, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL., *ante*, p. 1006;

No. 85-600. SLOAN ET AL. *v.* HICKS, TRUSTEE IN BANKRUPTCY OF BECKNELL & CRACE COAL CO., INC., BANKRUPT, *ante*, p. 1006;

No. 85-672. COHRAN *v.* CARLIN ET AL., *ante*, p. 1033; and

No. 85-5573. TURNER *v.* NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF SERVICES FOR THE BLIND, ET AL., *ante*, p. 1011. Petitions for rehearing denied.

No. 85–5583. BURTON *v.* SARGENT, WARDEN, *ante*, p. 1011; and

No. 85–5584. BURTON *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, *ante*, p. 1011. Petitions for rehearing denied.

No. 85–5382. WALLACE *v.* UNITED STATES, *ante*, p. 908. Motion for leave to file petition for rehearing denied.

FEBRUARY 10, 1986

Miscellaneous Order

No. A–593. ROOK *v.* RICE, WARDEN. Application for stay of execution of sentence of death scheduled for Friday, February 14, 1986, presented to THE CHIEF JUSTICE, and by him referred to the Court, is granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

FEBRUARY 13, 1986

Dismissal Under Rule 53

No. 85–5989. HORAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 774 F. 2d 1153.

FEBRUARY 14, 1986

Dismissal Under Rule 53

No. 85–6119. IN RE O'DELL. Petition for writ of mandamus dismissed under this Court's Rule 53.

Miscellaneous Order

No. A–622. KENNEDY *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death scheduled for Tuesday, February 18, 1986, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

JUSTICE O'CONNOR took no part in the consideration or decision of this application.

FEBRUARY 21, 1986

Dismissal Under Rule 53

No. 85–995. WESTERN UNION INTERNATIONAL, INC., ET AL. *v.* AMATO ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 773 F. 2d 1402.

Certiorari Denied

No. 85–6372 (A–609). MOORE *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay. Certiorari denied. Reported below: 700 S. W. 2d 193.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1113 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

REPUBLICAN PARTY OF HAWAII ET AL. *v.* MINK ET AL.

ON APPLICATION FOR STAY

No. A–428. Decided November 29, 1985

An application by the Republican Party of Hawaii and two Honolulu City Councilmen—who had been recalled from their offices in an October 5, 1985, election, and who sought to run in a special election scheduled for November 30 to fill the vacancies caused by the recall—to stay the Hawaii Supreme Court's judgment (or to enjoin the City Clerk's conduct) is denied. The Hawaii Supreme Court's judgment construed a provision of the Honolulu City Charter as preventing the recalled Councilmen from appearing on the ballot and ordered the City Clerk to enforce the Charter provision in the November 30 election. It was almost impossible in the length of time available to ascertain whether four Justices of this Court would vote to note probable jurisdiction of an appeal from the Hawaii Supreme Court's decision, or whether a majority of this Court would be likely to reverse that decision. The "stay equities" of the case and the usual presumption of constitutionality accorded to state and local laws require denial of the application.

JUSTICE REHNQUIST, Circuit Justice.

Applicants, two recalled City Councilmen of the city of Honolulu and the Republican Party of Hawaii, ask me to stay an order of the Supreme Court of Hawaii, or to affirmatively enjoin the conduct of respondent Pua, the City Clerk of the city of Honolulu. They claim that the following provision of the Honolulu City Charter violates the United States Constitution as interpreted by this Court in *Anderson* v. *Celebrezze*, 460 U. S. 780 (1983):

> "No person, who has been removed from his elected office or who has resigned from such an office after a recall

> petition directed to him has been filed, shall be eligible for election or appointment to any office of the city within two years after his removal or resignation."

Applicants Matsumoto and Paccaro were recalled in an election held October 5. They seek to run in a special election called to fill the vacancies caused by the recall which is scheduled for tomorrow, Saturday, November 30. The stay application was presented to me about 1 p.m., eastern standard time, today, Friday, November 29. The Court of Appeals for the Ninth Circuit concluded that the City Charter provision as it construed it was unconstitutional, but the Supreme Court of Hawaii has now adopted a narrowing construction, which nonetheless prevents Matsumoto and Paccaro from appearing on the ballot, and ordered the City Clerk to enforce the provision in tomorrow's election.

It is almost impossible in the length of time available to me to ascertain whether four Justices of this Court would vote to note probable jurisdiction of an appeal from the decision of the Supreme Court of Hawaii, or whether a majority of this Court would be likely to reverse the decision of that court. The City Charter provision as interpreted by the Supreme Court of Hawaii is not, in my judgment, clearly unconstitutional under our decision in *Anderson* v. *Celebrezze*, *supra*. Under these circumstances, the "stay equities" of the case and the usual presumption of constitutionality accorded to state and local laws lead me to deny the application.

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7. *State's expert witness—Inability to recall basis for opinion.*—Where, at respondent's murder trial resulting in his conviction, (1) State's expert witness testified that in his opinion a hair, which was similar to victim's hair and was found on murder weapon, had been forcibly removed, (2) expert testified on both direct examination and cross-examination that he could not recall what method he had used in reaching his "forcible removal" conclusion, (3) defense's expert witness testified that State's expert had previously informed him of method used, and (4) defense's expert then challenged premise of such method, prosecution's foreknowledge that its expert would be unable to give basis for his opinion did not impose an obligation on it, as a matter of due process, to refrain from introducing expert's testimony. Delaware v. Fensterer, p. 15.

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1. *"Bank."* § 2(c), Bank Holding Company Act of 1956, 12 U. S. C. § 1841(c). Board of Governors, FRS v. Dimension Financial Corp., p. 361.

2. *"Commercial loans."* § 2(c), Bank Holding Company Act of 1956, 12 U. S. C. § 1841(c). Board of Governors, FRS v. Dimension Financial Corp., p. 361.